

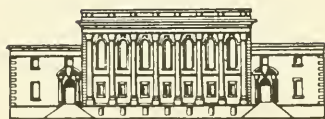
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THE PROTESTANT EPISCOPAL CHURCH IN VIRGINIA:
A LEGAL, RELIGIOUS AND HISTORICAL SURVEY OF
CURRENT CHURCH PROPERTY DISPUTES

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April 10, 1980

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PREFACE

A religious, historical and legal study of the Protestant Episcopal Church in Virginia and of its current dissenters, now a Diocese in the Anglican Catholic Church, follows on later pages. This presentation concludes my work on a Senior Honors Thesis at Sweet Briar College. When I began this survey into church property disputes within the Episcopal Church, my approach was, and still is, a scholarly one. I put aside all prejudices I might have and attempted to maintain a neutral position. I do not mean to condemn, assail or uphold either side; the thesis is a matter of academic exercise. None of its contents is meant to aid one side over another, but rather its value is in explaining a current phenomenon.

The thesis topic is one which fascinates me in several ways. First of all, I joined the Ascension Church Choir in Amherst, Virginia in 1977 and found myself in the midst of a religious dispute of which I was dimly aware but rather ignorant. Although I had been raised as a member of the Church, my understanding of the arguments was vague, and some background research was necessary. Secondly, this choral experience has given me a seat for first-hand observation. Knowing the people whose family history is deeply

rooted in the Episcopal Church makes me realize that the emotions and strains of leaving or remaining with the Church are genuine. Finally, I intend to pursue a legal career upon the completion of my undergraduate work. The research skills I developed after the initial introduction to a law library will be useful later. From all viewpoints, my interest has been intense, and I know it will not terminate here.

Before delving into the material, I wish to recognize and thank the many people who encouraged and assisted me through the year. To my advisors, Thomas Gilpatrick, Ferdinand Powell, Jr. and Steve Fanduzz, let me express my gratitude for the guidance they gave me. To Sarah Ramage, John Pedlar, Strother Smith, J.B. Wyckoff, Robert Lyons, Christine Faulconer, Mary Boxley, Christopher Bean, Perry Laukhuff, the University of Virginia Law Library Staff and the Diocese of Southwestern Virginia, I extend another hearty thanks for the numerous materials and advice. I am also grateful to John Savarese for reading through parts of it. Finally, I mention my typist, Teresa Carr, without whom the thesis would not have been legible.

With no further interruptions, let me urge you to read on about church property disputes in Virginia.

I pledge,
Florence Annette Powell
Florence Annette Powell
April 10, 1980

THE PROTESTANT EPISCOPAL CHURCH IN VIRGINIA:
A LEGAL, RELIGIOUS AND HISTORICAL SURVEY
OF CURRENT CHURCH PROPERTY DISPUTES

INTRODUCTION TO RELIGIOUS DISPUTE

Most clergy, laity and scholars of the Protestant Episcopal Church in the United States (PECUSA) agree that there is a growing conservative reaction to twenty years of doctrinal modernization and clerical liberality. How extensive this movement is has been disputed in the courtroom. The Episcopal Church would argue that there is only some temporary discontent over changes in The Book of Common Prayer (1928) and ordination of women. The PECUSA acknowledges the resignation of several clergymen and transfer of numerous parishioners who left to form another hierarchical church, the Anglican Catholic Church of North America (ACC). A general explanation Episcopalians give for the departure is the charismatic leadership quality of these priests who have led their flock down the schismatic path from the church. Once the priests die or become Bishops in the Anglican Church, the stray parishioners will return to the Episcopal Church. In rebuttal, the Anglicans maintain that the Mother Church left the "true" faith and doctrine. Each priest has searched his soul and found that the existing church was not adhering to the doctrine and principles he vowed to uphold at his ordination. Similarly, many of the church members have pondered over possible

solutions before leaving the church of their forefathers. Several retired Episcopal clergymen have returned to active service in the Anglican Church in response to calls from disheartened lay members. Unfortunately, the PECUSA has failed to realize how large the movement is and how great the strain of priest depositions and property right disputes will be. Most parishioners are confused and uncertain which group to follow. For at least part of them, the "Continuing Church," as the Anglicans call themselves, has filled a vacuum the PECUSA created when it modernized the old customs, traditions and doctrine.

In and among all the emotional rhetoric between the two groups, the word schism is used to define the division. Doubtless there has been a "parting of ways," but an observer must ask if schism is the appropriate term or if it is merely a snarling word thrown out at the Anglicans. Perry Laukhuff, President Emeritus of the Fellowship of Concerned Churchmen, defined schism as "a separation from the ancient Apostolic Church, caused by apostasy, an abandonment of that ancient Church's Faith and Order." In an address before the Congress of Concerned Churchmen, he further asserted that the Anglicans had not abandoned anything and that the group still adheres to "the One Holy Catholic and Apostolic Church of Jesus the Christ and Son of God, the Church of the Ages." In reply to the Episcopalian

snarl of schism, Laukhuff stated, "When others say we are guilty of schism, we fling the charge back into their teeth!"¹ Webster's Third International Dictionary, a neutral source, interprets the word as "a formal division or separation in the Christian Church or from a church or a religious body." Schism is an appropriate term; however, the implication differs with each speaker. Episcopalians use it to categorize a person who left their Church, the hierarchical organization, whereas an Anglican employs it as Laukhuff did to group those who abandoned the faith. Even more diluted terms must be interpreted with the speaker's point of view in mind.

The decisions which led to the split between the dissenters and loyalists of the PECUSA were neither easy nor intuitive. Several issues whose dominance has grown over the past twenty years led to the final split. As the Troy, New York newspaper Sunday Record reported on October 28, 1979, "the Anglican Catholic Church is a splinter group of former Episcopalians who objected to the ordination of women, acceptance of homosexuals and modernization of The Book of Common Prayer approved at the September, 1976 Convention in Minneapolis, Minnesota."² As one person observed, the Convention, "polarized the Church . . . between those who think Christianity is the voice of God and those who have gotten all their ideas and faith from the secular world."³ The Reverend Alan Carefull, Administrator

of the Shrine of Our Lady of Walsingham, England, blames the zeitgeist of the 1960's for the change in clerical attitudes. In "A Visit to the ACC," he remembers, "how 'Honest to God' was full of it, how priests would forsake their ministry to go and do social work, and how unfashionable it was to believe in God transcendent" during that decade. Moreover, God's kingdom had suddenly become a thing of the world. Americans moved farther toward materialism than Britons did and attacked the Creeds and Christian morality. Today, "Bishops and others openly proclaim their disbelief in God incarnate; it is no longer necessary to preach the indissolubility of marriage; sexual deviation and perversion are understood to be quite natural."⁴ Steve Lyne, who prepared a detailed report on the schism within the Episcopal Church, explained the "secular challenge" by examining the three triads on which the Church's faith is based.

Evangelicals and charismatics look primarily to Scripture to lead individuals to personal encounters with God. Anglo-Catholics lean on the traditions and practices established by the early Church to reaffirm the unbroken links between Christ, the early church, and today's Episcopalians. So-called "modernists" -- termed "secular humanists" by others -- have stressed the dominance of Holy Reason, which by using logic and by increasing the knowledge of the society, would discover the applicability of the basic truths, contained in the Scripture and Tradition, to the issues of the day.

The recent history of the Episcopal Church has been characterized by the growing ascendancy of the modernist followers of Holy Reason as the Church has had to come to grips with basic issues of society: social activism, the decline of moral standards, abortion, divorce and remarriage, the rights of homosexuals, and women's liberation.⁵

As one layman confessed to the Rev. Careful, "I felt completely let down, betrayed. My church was no longer teaching the faith. It seemed to be going crazy."⁶

The 1960's and 1970's were filled with unprecedented consecrations, exotic services and misused buildings as well as clerical denunciations of the faith. Robert C. Harvey recounts several of these occasions in his book A House Divided, published by The Canterbury Guild (1977). In 1969 a concert entitled "A Sensorium on Celebration of the Future" took place inside Grace Cathedral in San Francisco. The sanctuary, decorated with ballons and banners, also held a full camera crew which filmed the event. During a particular scene in the celebration, one cameraman leapt onto the altar for a better view and was very reluctant to descend from his lookout post. This same scenario was reinacted in New York's Cathedral of St. John the Divine in 1971 to protest the Vietnam War. The climax of the performance came when a tall usher wearing a pair of long johns, appeared. As he approached the altar with the alms,

all in attendance could see "the back flap was unbuttoned and hanging down, revealing a pair of hairy buttocks."⁷ Similar irreverent behavior occurred during celebrations of the Holy Eucharist. At the Clown Mass in South Bend, the celebrant dressed up like a clown, and each communicant had grease paint smeared on his face before receiving the elements. Another moving recollection surrounded a celebration at the Houston Convention. During the service, large loaves of bread and bottles of Cold Duck were consecrated, and communicants served themselves. After the service was over, an observer noticed an elderly priest kneeling before the altar; he was eating the crumbs which had been left behind.⁸ Although these unique events were extraordinary in form, they were accepted as long as the faith and doctrine were adhered to.

The first obvious challenge to modify the traditional beliefs of the church started in 1974, when four Bishops heeded the zeitgeist of women's liberation and the campaign for the adoption of the Equal Rights Amendment. In violation of the Canons and in face of injunctions to halt such action, the men attempted to ordain priestesses in the PECUSA and Diocese of Pennsylvania. Bishop Chambers, who was attacked for consecrating the original ACC Bishops, contrasted himself to these four Bishops. Chambers stated that "the Philadelphia Four" purposed to ordain "not only in the face of requests not to do so, but in total disregard of the fact that the ordination of women was not

contemplated or authorized in the constitution, Canons or The Book of Common Prayer." Later "the action taken in the General Convention that purported to authorize the ordination of women was wholly illegal by any standards of Common Law under which the church had existed for centuries."⁹ Retired Bishop Daniel Corrigan, one of the four who ordained the "Philadelphia 11," told the House of Bishops at the 1979 General Convention, "I broke the canons and never denied it - admitted it openly. I violated the rights of four of my fellow Bishops because my conscience called me to do so."¹⁰ Congregations and their priests as well as the bishops split over the ordination of women. One layman told the Rev. Careful, "I wasn't so bothered about women priests like some are [sic]."¹¹ Richard Thrumston, an Anglican priest in Houston, Texas, expressed his discontent in "Out of The Fire - and into the Frying Pan."

It wasn't the ordination of women that shorted my circuit. Of course, the notion of a female in the sanctuary would take some getting used to. But haven't the clergy always worn skirts? Some already have learned to fix their hair the way the girls have kept it for years. And surely the ample vestments would hide most everything else that would make a red-neck redder. No, it wasn't the idea of women in the priesthood, as such, that got to me. The issue, rather, was the deliberate tampering with the sacrament of Holy Orders in two of its essential criteria - subject and intention - at the cost of validity. It is a minor sacrament, to be sure, but one upon which a major sacrament - the Holy Eucharist - depends. And the Eucharist is necessary to salvation.¹²

The question is not entirely settled although the 1976 Convention sought to legalize the consecrations. The Bishops remaining with the PECUSA still have not reached a conclusive decision, whereas the ACC has as one of its foundation blocks that the Holy Orders consist "exclusively of men in accordance with Christ's Will and institution (as evidenced by the Scriptures), and the universal practice of the Catholic Church."¹³

The fate of one hundred sixty-one women in Episcopal Seminaries, an undetermined number of deaconesses and the more than seventy women (Steve Lyne, Department of State, says over one hundred) already ordained lies in the hands of the bishops. At the 1977 House of Bishops meeting there was no indication of the PECUSA unordaining the women already priests, and "the decision to ordain women to the priesthood is an irreversible one," since the 1976 Convention approved a canonical change permitting the ordination of women.¹⁴ Although the future of priestesses seems secure, several bishops have indicated that they cannot in "good conscience" ordain women. Consequently, two similar statements presented in 1977 and 1979 allowed the objectors to restrain from such action and agreed "that there shall be recognized and respected the right of members of this Church - bishops, presbyters, deacons and laity - to be free to exercise the dictates of their consciences,

whether they agree or disagree with the ordination of women to the episcopate and presbyterate." At the 1979 General Convention the House voted to table this proposal.¹⁵ As Eveland pointed out in 1979, "it is the PECUSA's intention that a woman can celebrate all the Rites in the Proposed Book, including Rite I - and that such a woman can believe in divorce and abortion on demand."¹⁶

A second challenge of the 1970's, the revision of the 1928 edition of The Book of Common Prayer, upset other basic beliefs of the Church. As late as 1967, literature about the PEC called for linguistic modernization and fervent participation, not unlike the Roman Catholic move from Latin to English. In following the trend Alice Bloom quoted a paragraph from A Short History of The Episcopal Church, (published in 1967 by Forward Movement Press) Powel Mills Dawley, editor, in Part I of "Slouching Towards Bethel " Dawley explained the need for "Liturgical Renewal":

This revision commended itself everywhere, but it is evident now, amid the ferment in Christendom, that the Prayer Book of forty years ago is no longer adequate to the demands of liturgical renewal in the contemporary world. There is a growing sentiment that more drastic revision may be necessary to contribute the strength of a reinvigorated Christian worship to the total renewal of the church in its mission, unity and obedience to the Lord of all life. Pressures of modern life, for example, may dictate shorter services, the incorporations of biblical material that speaks more plainly to a generation almost illiterate in the Scriptures as a whole, and even the use of language that affects the vocabulary of the age.¹⁷

With these goals in mind, the Standing Liturgical Commission developed several trial books under such names as The Blue Book, The Green Book, and The Zebra Book. From 1970 to 1976 after a specified amount of trial use, congregations and their ministers sent in suggestions for deletions or additions. At the 1976 General Convention a Proposed Book of Common Prayer received approval. The 1979 Book of Common Prayer is the final product; many parishioners view it as a mixture of deletions of essential meanings of the faith and additions from the Eastern Orthodox and Roman Catholic beliefs. Some of the phrases and prayers which were deleted in earlier editions have been reincorporated. In an effort to reach more people and incorporate the PEC into more diverse lifestyles, the church tore up its roots and may have lost its life support.

The modernization of the text was a valuable idea as long as the fundamental understanding remained the same. In Part II of "Slouching Towards Bethel," Bloom compared the 1928 passage "it is very meet, right and our bounden duty" to the 1979 Rite II version "it is right, and a good and joyful thing." As Bloom protested, " 'good' does not equal 'meet,' and 'joyful thing' is not synonymous with 'bounden duty.' " In another example a Bishop told a story about the updating of the phrase "renounce the devil and all his works" found in the Baptismal service. Upon commenting

that he believed the text was adequate, another Bishop replied, " 'Come, certainly no one believes in him anymore.' " ¹⁸ Deletion and omission took the Prayer of Humble Access out of Rite I because the corrupt Puritanism of the Sixteenth Century was no longer necessary. ¹⁹ In Rite I the Prayer suffered from changes as did the Prayer of Thanksgiving. Many Episcopalians argue that Rite I is the 1928 service; however, transformation of the text has modified the meaning. Finally, alterations to confirmation orders have "lost the awareness of personal responsibility" while fitting the ceremony to modern needs of rededication of one's life to Christ and visitation of people belonging to other denominations. ²⁰

The Episcopal laity prepared to resist the final vote securing the 1979 edition. George Gallup held a poll for the Society for the Preservation of The Book of Common Prayer six weeks before the Convention. The results showed that seventy-one percent of the laity wanted free choice between the 1928 and 1979 editions while eighty percent of the clergy preferred the newer version. For fear of losing more parishioners to the splinter groups and in apprehension of lower contributions, the clergy did not push for a complete switch. Instead they compromised; the 1979 edition became the standard liturgy, and the 1928 edition might be used where the rector and Bishops of the diocese agreed to it. ²¹

Since the convention's tone was moderate, the bishops handled the homosexual question with due caution. In their resolution, the majority of the House upheld traditional teachings and did not promote ordination of individuals who are homosexuals or who engage in extra-marital relations.²² The resolution was an effort not only to prevent discord among lay members, but also to stop scandalous stories, like the ones surrounding lesbian Ellen Barrett, from reaching the press.

Many of the laity cannot understand the clergy's great movement toward modern trends. Scholars watching the events trace the beginnings back to the seminaries. Basic courses such as doctrine of grace, history of the Western Church, Eastern Orthodoxy and mystical experience were replaced by courses concerning protest, economic justice, psychotherapy and social change.²⁵ Such liberal seminary training has led to what Bishop Chambers called a "moving with the times, not adhering to [the Church's] vocation to witness to the Apostolic Faith, and accepting secular standards and ideas."²⁴ Dissenters see how unfortunate it was that the Episcopalians obediently followed their Shepherds' lead until one day they realized the church had gone astray. The day of revelation came too late to stop the trends. As one member explained to a Briton, "We want you to understand, Father, that we have not left the Church; the Church has left us." Even though many priests and laity are still "riding the fence"

and will continue to attend one church one week and the other the next, in hopes of an union, "reconciliation is impossible for years to come. The ACC has challenged the whole concept of the Anglican Communion as adumbrated in the latest documents to emerge from the Lambeth Conference."²⁵ The Episcopal clergy as well as some of the future-oriented parishioners forecast a fusion of all Christian Churches, and the 1979 Prayer Book foreshadows that event, for Rite II is patterned very closely on the Roman Mass. The Anglicans resent this movement towards Rome and unification. As Eveland insists, "Our ethos is the Church of England, that of the Celts, Anglo-Saxons, the lovely Sarum Use, the work of Cranmer, Bishop Cosin and other great Anglican Divines. Our heritage is the wonderful work of Samuel Seabury in the United States."²⁶

Under the direction of the Fellowship of Concerned Churchmen and Perry Laukhuff, President, Episcopalian dissenters assembled in St. Louis on September 14, 1977. The greatest accomplishment of the Congress was The Affirmation of St. Louis. (See Appendix A.) This document defined the beliefs on which the ACC was built. During this extraordinary time, several dioceses began and the search for three Episcopal Bishops willing to consecrate devout, educated priests commenced. After the Congress concluded the participants departed to spread the news of the "Continuing" Church and to rejoice with disheartened Episcopalians in their parishes.

Laukhuff contacted all Bishops in the Anglican Communion, retired and active; various replies came to his letter. Four Bishops finally consented to participate in the consecration set for January 28, 1978.

Severe pressure and persuasion fell on these four men because the Anglican Communion, especially the PECUSA and Archbishop of Canterbury, did not approve of another Anglican branch in the United States. Bishop Charles Boynten, retired, was under a physician's care for high blood pressure which inhibited his participation. Bishop Mark Pae of Korea was persuaded by the Archbishop of Canterbury not to attend; he threatened to cue Pae off from the Anglican Communion. The Rev. Dale Doren did secure a handwritten letter from Pae to Chambers, one of the retired Bishops who had agreed to consecrate, in which Pae agreed to Doren's consecration. The only two Bishops present at the consecration were Albert Chambers and Francisco Pagakhan from the Philippines.²⁷ Doren was consecrated first and then participated in the ceremonies of James O. Mote, Peter F. Watterson and Robert S. Morse. Once these priests had been duly consecrated, the Episcopal Church questioned the validity of the service. The Anglicans fiercely defended these consecrations by citing two different sources. First, Canon Four of the Canons of the Council of Nicea called for three bishops at all events; however, experts advised that the ancient Greek term does not have an appropriate English equivalent and that the translation

of should could be closer defined to "desirable, but not necessary." Secondly, in Book VIII, Section 3, Sub-section XVII of The Apostolic Constitutions, the passage states, " 'Let a Bishop be ordained by three or two Bishops; but if anyone be ordained by one Bishop, let him be deprived, both himself and he that ordained him. But if there be a necessity that he have only one to ordain him, because more Bishops cannot come together, as in time of persecution or for such like causes, let him bring the suffrage of permission from more Bishops.' " ²⁸ Thus, unlike the Methodist bishops, the Anglican splinter has valid Bishops, even though the Anglican Communion may not recognize them. One way to remedy the dispute would be to persuade the Archbishop of Canterbury to re-consecrate three of the bishops; such action would break up the monopoly the PEC has on the Anglican tradition in the United States.

From these two shoots, the Congress in St. Louis and the consecrations in Denver, the ACC has grown into a mere sapling. At times, the young tree of faith has suffered the disease of blight. Initially, the Rev. Canon Albert J. duBois demonstrated little support for the Fellowship. Instead, the American Church Union under his directorship organized a group known as Anglicans United which held at its apparent goal "the creation of an Anglican province that could be taken, as a whole, into another already-existing branch

of the Holy Catholic Church - such as Rome, Constantinople, or Utrecht." DuBois' group claimed the Fellowship was moving so slowly that by the time of the St. Louis Congress, thousands would have left the PEC.²⁹ Furthermore, after the tree had begun to grow and develop limbs, two of the branches broke off. Two of the four original bishops consecrated in Denver, Watterson and Morse, led a walk-out at the Dallas Constitutional Assembly in protest to the proposed Constitution. Since much of the convention time was wasted on the objection, the articles which had not been discussed and ratified were provisionally approved until such time as they could be properly dealt with.³⁰ Meanwhile one Bishop's supporters circulated rumors that the Constitution was a "Protestant plot."

Frazer Barron described the most recent splinter as a definitional problem. In his article "The Continuing Church Movement," he explained that the difficulty arose from maintaining the faith in Anglicanism, which had never been distinctly defined. These two movements had always existed in the PECUSA and could not be truthfully construed as low church versus high church or Protestant versus Catholic.³¹ Dorothy Faber, editor of The Christian Challenge reported in December, 1979 that the two protesting bishops could not agree with each other. Bishop Watterson refused to accept his own canons because he wanted his diocese to cover more area, because he requested a canon to prevent one Bishop from publicly

attacking another, because he wished to suppress dissidents immediately, and because he thought missions and vicars more useful than parishes and priests.³² At present there are three protesting groups: the ACC, the Watterson and Morse group, and the ECM.

Shortly after the Minneapolis Convention of 1976, another group developed, this time within the PECUSA. The Evangelical-Catholic Mission (ECM) organized some thirty Bishops and forty-thousand supporters who were opposed to women being ordained but who felt the Anglicans were fools to leave the existing hierarchy. Some ECM proponents argue, "One cannot be a Catholic Churchman outside of the Church." Yet many ECM members are apprehensive, and it looks as if they, too, might join the ACC should the PECUSA continue down its humanistic path.³³

The PECUSA is worried over these movements. As mentioned above, it questions the validity of the consecrations. After bringing Bishop Chambers before the House of Bishops to condemn his part in the consecrations, the group adopted a resolution which stated: "This House decries and repudiates the intervention of the Rt. Rev. Albert Chambers into Dioceses where he had been specifically requested not to perform or had not been authorized to perform Episcopal acts and cannot accept his stated reasons for having done so." The House also urged all members "to refrain from performing any Episcopal acts in any Diocese, and in any church no longer in

communion with this Church so long as he is a member of this House."³⁴ On a lower level of the Episcopal hierarchy, several Bishops have deposed priests who protested the modernizations. Other clergymen have resigned to join the ACC. Purging parish rolls has occurred more gradually than the sweeping out of clerical schismatics, for many of the parishioners are reluctant to leave the church and hope that the liberal moves will mellow. Another problem with purging the rolls is that the local priest compiles the list; usually a member remains on the list unless he requests to be removed. Many Episcopalians are still "riding the fence" between the two groups, and Episcopal priests have not compelled them to choose sides for fear of losing more communicants and contributions. Consequently, several hundred Anglicans still receive Episcopal literature. This indecisive action toward the laity sharply contrasts the strong reprisals priests have received.

The deepest rifts between the loyalists and dissenters develop from property disputes. In some situations the Anglican groups have left the building and furnishings without an uproar. In other cases where a majority of the congregation voted to join the ACC hierarchy the Episcopalians regained possession only after a local court ordered the Anglicans to vacate the building. The Episcopalians resent the Anglican move to take the church property with them; however, the Anglicans contend that they are the "true"

Episcopal Church and have the right of title. The decision made by each congregation to contest or to leave peacefully depends on the particular state's laws, the wording of the deed, and the attitude of the parishioners and priest toward civil lawsuits over ecclesiastical disputes.

These national problems have affected every parish throughout the United States. The Ascension congregation's dispute in Amherst, Virginia, is only one example where the schism occurred and the church property is contested. Each side has strong loyalties toward either the Episcopalians or Anglicans. The past Bishop of the Diocese of Southwestern Virginia deposed the Anglican priest because, in the Bishop's view, he left the church and joined another group, the ACC. Divided almost evenly between the two groups, the congregation has experienced the trauma associated with conflict over modernization of old traditions and Church doctrine.

AMICUS CURIAE BRIEF ON APPELLANTS BEHALF

The brief which follows is an attempt to apply the legal principles which I researched to an actual case, Diocese of Southwestern Virginia v. Wyckoff, infra. (1979). This church property dispute is on appeal to the Virginia State Supreme Court from the Circuit Court of Amherst County. Using the Rules of the Court found in Volume 216 of The Virginia Reports, the regulations for an amicus curiae briefs state that the document should follow the format of the party supported. Thus, my brief must contain the provisions detailed in Rule 5:42 pertaining to the opening brief for the appellant. Since I am not directly involved in the case some of the facts and formalities, such as the case number, are missing.

In The
SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA
Richmond, Virginia

DIOCESE OF SOUTHWESTERN VIRGINIA OF THE PROTESTANT
EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA ET AL,

Complainants - Appellees

v.

J.B. WYCKOFF ET AL,

Respondents - Appellants

On Appeal from the Circuit Court of Amherst County

AMICUS CURIAE BRIEF FOR THE APPELLANTS

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ACTION IN LOWER COURT

The Diocese of Southwestern Virginia of the Protestant Episcopal Church, Benjamin D. Smith and S. Cabell Burks, wardens of Ascension Episcopal Church, and William Hudson and W.R. Cash, wardens of St. Mark's Episcopal Church, instituted action in the Circuit Court of Amherst County. Named as defendants were J. B. Wyckoff, William E. Sandidge and William N. Mays, trustees of Lexington Parish, John A. Pedlar, rector of the Parish, and Edgar J. T. Perrow and Walter Bain, former Secretary and Treasurer respectively, of Ascension Episcopal Church. The object of the suit was to adjudicate the ownership of the property, real and personal, of Ascension and certain personal property of St. Mark's. The Diocese also sought to enjoin Wyckoff and the others from further use and occupancy of the property and to compel the trustees to hold the property for the use and benefit of the Protestant Episcopal Church.

The Minister, a majority of the wardens and vestry, a majority of the trustees and a large portion of the congregation of Ascension Church in Amherst, Virginia remained in possession of the church property and disassociated themselves from the Episcopal Diocese. They continued to conduct services in the church property in Amherst according to the previously used liturgy of the Protestant Episcopal Church under the denomination of the Anglican Catholic Church.

The Diocese of Southwestern Virginia of the PEC and wardens appointed by the remaining adherents to the Episcopal Church sought to have themselves declared the benefactors of the church property and to have a decree entered which required the trustees to hold the property for the benefit of the local Episcopal congregation. In the suit, a demurrer by the respondents was interposed which challenged the court's power to make a decision as to which group was the "true" church. Wyckoff and the others alleged that such a decision constituted an establishment of religion inhibited by the First and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF QUESTION

The fundamental question raised by demurrer was whether a decision of the issue would require the lower court to establish, by its decree, one group or the other group as the "true" religion in violation of the First and the Fourteenth Amendments to the Constitution of the United States before the entitlement to the property or benefits of trust could be resolved. The lower court overruled the demurrer, and the question is now raised on appeal.

In short, the question is does a decision of the controversy require the court, as an agency of the state, to first establish one of the contending parties or the other as the "true" church in order to determine the property title? If so, do the First and the Fourteenth

Amendments to the Federal Constitution deprive the court of jurisdiction from making that determination?

In other words, should the circuit court, for lack of power to decide the case, have left the parties in the condition in which it found them at the time the case was initiated, rather than ruling in favor of one faction or the other?

STATEMENT OF FACT

The proof presented at the trial showed that an 1847 deed conveyed "1 rod and 4 1/2 _____, more or less, on which preparations were being made to erect a new brick church," to a "special trust" and a "special confidence" so that the grantees and their survivors, and the heirs and their survivors "shall and will forever have and hold the said parcel of land with all the improvements . . . for the use and benefit of the Protestant Episcopal Church" and its successors. By an 1860 deed another adjoining quarter of an acre of land was conveyed for the same use and purposes and upon the same conditions and trusts as the first parcel of land.

ARGUMENT

- That the Circuit Court of Amherst County had the power to decide if it had jurisdiction over the case in hand cannot be disputed. Originally, it was apparently not recognized that the First Amendment, as made applicable to the states by the Fourteenth Amendment to the Federal Constitution, prevented a state court from adjudicating which

was the "true" religion as between two contending parties. Justice Miller in Watson v. Jones, 13 Wall. 679 (1871), stated that, "When a civil right depends upon an ecclesiastical matter, it is the civil court, and not the ecclesiastical which is to decide." The U.S. Supreme Court considers rights of property a civil right. However, the Justice warned that "the civil tribunal [must] try the civil rights and no more, as it finds them." (13 Wall. 731) The Supreme Court reasserted this right to adjudicate in Presbyterian Church v. Hull, 393 US 440 (1969), but Justice Brennan reiterated that civil courts could not determine ecclesiastical disputes without repulsing the American tradition of separation of church and state.

In Carr v. Union Church of Hopewell, 186 Va. 411 (1947), the Virginia Supreme Court held that property rights might be litigated in the courts, but in this case the question of the effect of the First and Fourteenth Amendment of the Federal Constitution on the exercise of jurisdiction was not debated and decided by the court.

Before the Amherst Circuit Court could adjudicate the issue, it must necessarily establish one religion over another. Since both parties claimed to be the continuing Episcopal Church, and thus the benefactor of the "special trust" created in the deeds, the court had to decide which faction was the "true" church, and in that determination it established the Episcopal Church over the Anglican Church.

The First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion . . ." Justice Black in Everson v. Board of Education, 330 US 1 (1947), defined "establishment of religion" as meaning "at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another . . ." (330 US 21-2). The Everson decision applied the First Amendment prohibition to the states through the Fourteenth Amendment. Douglas further asserted in Zorach v. Clauson, 343 US 306 (1952), that the government must remain neutral in competition between sects. (343 US at 313-314). The Circuit Court of Amherst County violated the First Amendment of the Federal Constitution as made applicable to it by the Fourteenth Amendment and did not adhere to the prior adjudications of the U.S. Supreme Court.

By determining which faction was the "true" church, the lower court awarded the property to the faction which "would most faithfully carry out the purposes of the religious trust." (344 US at 109) Justice Reed criticized such action of the Illinois Court of Appeals in Kedroff v. St. Nicholas Cathedral, 344 US 94 (1952), and a majority of the U.S. Supreme Court reversed the action of the court. This thrust toward noninterference surfaced in Serbian Orthodox Diocese v. Milivojevich, 426 US 696 (1976) which held that civil courts must avoid ecclesiastical disputes and interpretation of doctrine

in compliance with the First and the Fourteenth Amendments. The Circuit Court of Amherst County did not follow these precedents, and its action enjoining Wyckoff and the others from use and occupancy of the property necessarily established the Episcopal congregation as the "true" church.

The order of the lower court had the same effect as a private act of the General Assembly of Virginia would have had if the legislature had passed a bill giving the property title to the local Episcopal congregation. As Glenn stated:

"The same sort of legislation takes place; for the resemblance of the common law judgment to an Act of Parliament is too close for one to say less than that a judgment legislates in the sense of expressing the will of the State (Garrard Glenn, The Law of Fraudulent Conveyances (1931) Section 19, "The Title that the Purchaser gets on Sale under Judgment" pp. 31-32.)

Blackstone also implies that the judgment of the court is not their own, but an act of law which binds the parties just as an Act of Parliament would. (Sir William Blackstone, Commentaries on the Laws of England in Four Books, Book III (1868) p. 396.)

Kreshik v. St. Nicholas Cathedral, 363 US 190 (1960) rested on the same principle which Glenn applied in the passage above. The majority of the U.S. Supreme Court ruled, in a per curiam opinion, that freedom of religion applies to all types of governmental action and to state governments, both the judiciary and legislature.

Since the Court cannot adjudicate the issues without first establishing one religion over another the party in possession is in the preferred position. Following the common law maxium In aequali jure melior est conditio possidentis et defendentis (Where the right is equal the condition of the possessor and of the defendant is better), (Henry R. Gibson, Gibson's Suits in Chancery, 4th ed., 1937, Section 54 - "Where there is Equal Equity the Law must Prevail," p. 69), the Circuit Court should have dismissed the suit because of its inability to make a determination as to which was the "true" religion, thus leaving the respondents in possession of the property.

For this error, the Supreme Court of Virginia should exercise its jurisdiction and correct the action of the Amherst Circuit Court.

RELIEF

It is submitted that the Supreme Court of Virginia should take jurisdiction and reverse the action of the Circuit Court of Amherst County in overruling the demurrer, sustain the demurrer and order the suit dismissed for lack of jurisdiction to decide the issue, thus leaving the parties in the condition in which the court found them when the suit was filed.

EVOLUTION OF SEPARATION OF CHURCH AND STATE

The idea of separation of church and state is a modern doctrine in comparison to the known length of civilized society. Three hundred years ago, if dissenters, such as the Anglicans discussed in the previous section, had rebelled against the Established Church, an Act of Uniformity would have forced them to conform. Implementation of church doctrine had been in the hands of British monarchs since the conversion of the Celts. Missionary monks presented Christianity in the royal courts where they converted the pagan leaders. Once the royal family accepted Christianity, the monarch could compel his subjects to worship Christ. "With the favors thus accorded Christianity by the state came the price religion must always pay for state favors -- state interference in religious affairs . . . The Church . . . welcomed the state's persecution and repression of the nonconformist and the unorthodox."³⁵ Both authorities liked the advantageous relationship, but conflicts often arose over who had the final control. Henry VIII settled the English dispute in 1540 when he declared himself the head of the Church of England. With the expulsion of the Pope, church and state were completely interlocked.

William the Conqueror was the first monarch to separate, to some extent, the powers of each authority. William I and Lanfranc created two separate courts in medieval England, although the dis-

tion was not a clear one. Henceforth two judicial systems developed; the royal courts administered the monarch's law while ecclesiastical courts applied a uniform canonical code.³⁶ The American Lockeians of the 1700's completed the separation which William I began.

Jefferson and Madison knew that when the State had authority over religious affairs, persecution and taxation usually followed. Consequently the two Virginians pressed for the adoption of a religious freedom clause, first in the Virginia Constitution and then in the Bill of Rights of the United States Constitution. With this liberty as one of the foundation blocks of this new nation, all citizens and immigrants could worship according to their conscience, without facing Acts of Uniformity and fines for nonattendance.

When the first English settlers arrived in Virginia, they brought with them the Established Church of England. Robert Hunt, the first Anglican chaplain to survive, accompanied the colonists who built Jamestown in 1607. The Charter from James I to the Virginia Company ordered that:

the said presidents, councils, and ministers should provide that the true word and service of God be preached, planted, and used, according to the rites and doctrine of the Church of England, not only in the said colonies, but also, as much as might be amongst the savages bordering upon them; and that all persons should kindly treat the savage and heathen people in those parts, and use all proper means to draw them to the true service and knowledge of God.³⁷

Hunt worked as diligently as an Elizabethan cleric could in the wilderness, but his efforts to maintain goodwill among the colonists failed. He died shortly thereafter, and the Rev. William Whitaker, who succeeded him as the only cleric in the colony, arrived with the new governor, Sir Thomas Dale.⁵⁸ Finding the colony undisciplined, Dale set up ecclesiastical laws which, among other things, called for attendance of Morning and Evening Prayer and instituted penalties for blasphemy of the Divine's Name and unlawful oaths. Ministers were to preach every Sunday morning, to keep up the building with the assistance of four lay members, and to record all baptisms, marriages and deaths. These laws, however, were difficult to enforce since many of the settlers lived too far away for daily attendance.³⁹ The next governor altered these laws but hardly modified them.⁴⁰

With the arrival of a gentler governor in 1619, the colony grew more prosperous. Governor Yeardley had specific instructions from the London Company to "establish a better commonwealth." In obedience to the order, the first elected, representative government in the American British colonies convened on July 30, 1619, in the Jamestown Church. One of their initial acts "provided for the proper cultivation of the ministers' glebes and full payment of salaries in the best corn and tobacco." Each plantation had an appointee who collected the minister's share, and if a planter sold his share before the minister was paid, he faced a double assessment.⁴¹ In addition to

the fixed salary from the sale of tobacco, the ministers were furnished with glebe lands, a hundred acre tract of farmland. Other ratified legislation reaffirmed that all citizens must conform to the Church of England and dutifully attend divine services twice on Sunday. Since there were only three priests and two deacons in the colony, the House of Burgesses appealed to the Bishop of London for more clergy. However, after a massacre, rampant disease and a famine devastated the colony in 1622, the Virginia Company found their investment on the brink of disaster.

The King and Privy Council intervened in 1624 and revoked the royal charter because the company had failed to propagate the faith and increase trade. Under a new constitution, the pattern of royal government with local participation began, and Anglicanism was legally established. Bishop Laud had finished arrangements for sending an episcopate to America in 1638, but the Puritan Revolution halted any plans until the ascension of William and Mary to the throne in 1688. During this interim especially, the church suffered from the lack of a Bishop's guidance. Even though the Established Church supported the monarchy, Cromwell did nothing to prevent Anglican worship in the colony.⁴² The lack of action was a detriment in itself, for in 1660 there were ten ministers left to serve fifty parishes, and the support for them was marginal.⁴³

By an Act of 1641, the House of Burgesses created an "English type of parish government by requiring vestries to govern the local parishes." In general, the colonial Virginia legislature regulated church affairs; locally the elected vestries became "self-perpetuating oligarchies favoring the wealthy." Vestries overruled the clergy and often subordinated the minister through their power of annual appointments. "The result was a depletion of properly qualified clergymen and the even greater need for general regulation and supervision."⁴⁴

The coronation of William and Mary in 1688 preceded the passage of the Toleration Act of 1689 and its confirming statute of Virginia in 1699, which relaxed conditions for dissenters. In 1689 the Bishop of London took a more active role in the Church in Virginia. Since John King, then Bishop of London, had been a member of the first Council of the Virginia Colony, the Bishops of London bore the responsibility for the Virginia Church. They had customarily licensed candidates for colonial ministry. It was not until 1675 that Bishop Henry Compton had instructed the colonial governors that a license was necessary before they could appoint a minister to a local parish.⁴⁵ Hoping to establish more guidance over the clergy, Compton set up a commissary in Virginia and placed James Blair in command.

James Addison, in The Episcopal Church in the United States, 1789-1931, defined a commissary as "the agent or deputy of the bishop, with power to perform all episcopal functions except Confirmation and Ordination. In other words, he was theoretically authorized to make visitations, call conventions, suspend clergymen, and otherwise exercise discipline."⁴⁶ The Bishop of London realized that the morality of the clergymen was not virtuous and that the vestries held more power over the clergy than the episcopate. As Raymond Albright, in A History of the Protestant Church, stated, "There was little pretense of moral leadership among the clergy." Acts of the Assembly kept many ministers from dice, drunkenness and other frivolities, but the necessity of such action caused the common folk to lose respect for the Episcopal clergy.⁴⁷ Blair soon discovered that his power was limited to warning and scolding; however, his particular Scottish stubbornness helped him accomplish several things. Blair's greatest achievement was the founding of the College of William and Mary which was to prepare students for the ministry. Unfortunately few candidates had the money or wished to risk the dangerous journey to Britain for the formal ordination, and the shortage of clergy persisted until after the Revolution. Likewise, few Virginian families allowed their children to be confirmed. Most parishioners who received communion had been baptised and were ready for confirmation. The orders of confirmation and ordination were generally postponed,

and only after the creation of the PECUSA were parishioners confirmed and the clerical shortage eliminated. By 1680 there were forty-eight parishes served by thirty-five ministers.⁴⁸ The House of Burgesses and local vestries had ultimate control over these parishes whereas the Bishop of London and the commissary oversaw the clergy. Since the days of the patent the Bishop of London led the spiritual direction, and the Governor held the expressed power of induction which was an inalienable right of the elected representatives of the people, the vestries. These groups of people by-passed both the Bishop and the Governor.⁴⁹

During the colonial period, the Church lacked the hierarchical leadership it was built upon. The three thousand mile separation from the Bishop of London inclined people to regard the Shepherd as a foreigner.⁵⁰ Furthermore, colonists looked upon Bishops as dignified people who lived in palaces, had six white horses and a carriage, and suited the courts; somehow these "creatures" did not belong in Jamestown and other frontier hamlets. George Hodges outlined the various reasons why the Bishop of London never appointed a Bishop of America. He reasoned that:

The wars of the seventeenth century kept the attention and interest of most men at home; they had no time to mind the colonies. The wars of the eighteenth century fostered the spirit of independence which at last asserted itself in the American Revolution; people in this country, at first Puritans, but

afterward Churchmen also, objected to an institution which might hold the colonies more firmly to the English throne. Thus in the seventeenth century, when American Churchmen appealed for a bishop, they were met by English indifference, and in the eighteenth century, when English Churchmen were desirous that a bishop should be sent to America, they were met by American hostility; and there was no bishop.⁵¹

Even some of the clergy found life difficult to adjust to in Virginia. Oftentimes the men could not understand their parishioners, and similarly the followers were far removed from the priests. Many of the immigrants favored non-episcopal forms of worship.⁵² The lack of a sufficient number of priests coupled with growing independence and dissenting immigrants explained why many of the pioneers west of the Blue Ridge were not Anglicans. "Dissenters supplied the missionary energy demanded by a moving frontier," as Addison commented. By the eighteenth century Nonconformists, especially the Baptists, Presbyterians and Quakers, gained support in the older portions of the colony.⁵³ Disorganized Anglican ministers had succumbed to aristocratic vestries which had replaced the episcopal authority.

Not only was the Bishop-in-charge far removed but also no ecclesiastical courts existed to adjudicate cases of canon law. As Powel Dawley asserted, "In the absence of immediate episcopal oversight, both the authority of the civil government in ecclesiastical

affairs and the powers of law vestries were greatly increased."⁵⁴

James Blair, writing in The Present State of Virginia and the College, described the local control as follows:

In every Parish, by the Law of that Country, there is a Vestry consisting of twelve Men, chosen at first by all the Masters of Families in the Parish. They have a Power to continue themselves, for as one dyes [sic] or removes out of the Parish, the remaining Vestry-men chuse [sic] another in his room. Those Vestry-men lay the Parish Levy, and manage all other parochial Matters. The Power of presenting Ministers is in them by the Law of that Country; But the Law in this Point is little taken Notice of, by reason of a contrary Custom of making annual Agreements with the Ministers, which they call be a Name coarse enough, viz., Hiring of the Ministers; so that they seldom present any Ministers, that they may by that Means keep them in more Subjection and Dependence. This Custom has had a great many bad consequences. No good Ministers that were inform'd of it would come into the Country, and if they came, ignorant of any such Custom, they quickly felt the Effects of it in the high Hand wherewith most Vestries manag'd their Power, and got out of the Country as soon as they could. The Mansion Houses, if there were any, were to Decay, the Ministers holding the Living so precariously, that it could not be expected he would bestow much on Reparation; and very often the Glebe was not in his Hand. He stood likewise on so precarious Terms, that he must have a special Care how he preach'd against the Vices that any great Man of the Vestry was guilty of; for if he did, he might expect a Faction would be made in the Vestry, to be against renewing the Agreement with him for another Year. In short, several Ministers were turn'd out by the Vestries, without any Crime proved, or so much as alledg'd against them. And this is their Case at this Day: They are only in the nature of Chaplains, and hold their Livings by annual Agreements with the Vestries; at the Expiration of which Agreement the Minister is dismiss'd or retain'd at the Vestries Pleasure.⁵⁵

Blair wanted parishes modeled after the British system he had known, but from the beginning the American people, not the clergy, directed the parishes.

Joseph Dunn, a priest from Suffolk, Virginia, explained the difference in his essay, "The Church in Virginia in the Days of the Colony."⁵⁶ He wrote "the Church in Virginia was from the first the Church of the people rather than the Church of the clergy." The people constructed the buildings and purchased the glebes; their "demand for clergy was always greater than the supply." The independence of the Burgesses reflected the spirit of the people.⁵⁷ The vestries were more than ecclesiastical units; they were governmental organs which "collected taxes, dispensed information about governmental matters, took care of the orphaned, sick and needy, and regulated the morals of the local community." These men were generally free to manage the parish affairs. In their oath they pledged to perform their duties as directed by "the laws and customs of this country, and the Canons of the Church of England, so far as they [would] suit [their] present capacity . . ." Many of the Burgesses had served on parish vestries, and from those colonial representatives came some of the Founding Fathers of the United States.⁵⁸

To become a Burgess, one needed the proper birth and position, and such requirements were also prerequisites for election as a vestryman. As in Britain, the population practiced a form of

of deference which allowed those who were qualified to participate in the democratic government. These headstrong, ambitious vestrymen assumed the responsibilities of ecclesiastical courts when the commissary failed. The body summoned clergy and tried them for bad behavior; if the ministers were found guilty, they were expelled. In accomplishing their sworn duty, the vestry demanded "a high standard of life and character on the part of the clergy," as Dunn recalled.⁵⁹ The Church of Colonial Virginia is one of the best examples of a Church of the people because the colonists not only "established" it, but they also extended it to meet their growing needs.⁶⁰ Colonial "establishment" meant two things in Virginia, according to Freeman Butts. First, "the state enforced financial support for the established church"; secondly, "the state gave legal and moral support to the doctrines and public worship of the established church."⁶¹ The vestries took over the care of the poor, orphaned and waif; "they held loyalty to God and to His Church not an accident, but an essential of good citizenship."⁶² Church and state were interlocked for the improvement of society's welfare.

An illustration of this interlocked position was the House of Burgesses' co-creation of parishes and counties. Whenever the House of Burgesses created counties from 1619-1785, corresponding parishes were established; they covered the same area as the county. The only exception to this rule was during Cromwell's reign from

1649-1660. At that time, if counties did not have parishes, the General Assembly gave the County Courts the power to divide the area into parishes, and each parish had the right to choose its own minister.⁶³ An example of this co-creation was Amherst County and Amherst Parish, both of which descended from Henrico County and Parish, respectively. In an Act of the Colonial Assembly in March, 1761, Amherst County grew out of a division of Albermarle and Louisa Counties. Amherst covered the tract of land which lay above Rockfish River and a line which ran on the north side of the James River from "the confluence of Rockfish River with the Fluvanna (James), by Rockfish River to the mouth of Green Creek and then a straight line to the house of Thomas Bell to the Blue Mountains." (7 Hening 419)⁶⁴ The same act also created Amherst Parish out of St. Anne's Parish. The original Amherst Parish was divided again in 1778, and Amherst County contained Lexington and Amherst Parishes. The Amherst Parish area later became Nelson County, and Amherst Parish vanished, leaving in its place Nelson Parish.⁶⁵ According to the Historical Sketches and Notes of Ascension Episcopal Church, published in 1977, the vestrymen and members of the southern section of Amherst Parish were so upset over their Parish being named for Lord Jeffrey Amherst, a British officer, that they petitioned on October 5, 1778 for a new division. The new parish, formed

in 1779, was named Lexington in honor of the first battle of the Revolutionary War.⁶⁶ It was the Burgesses' duty to see that all counties had parishes and ministers.

The Presbyterians setting in the mountains were the first denomination to secure a general assurance from the Colonial Governor that their preachers could promulgate their faith without fear of persecution, as long as they took the oath and registered their places of worship. Governor Gooch construed the Act of Toleration of 1689 as broadly as possible because he wished to build a solid defense against the Indians which the French were stirring up. He knew that the Scotch-Irish were brave and hearty, therefore, he encouraged the leveling of forests and fighting of Indians.

In 1732, Delegate John Caldwell persuaded the Synod of Philadelphia to intercede for the Scotch-Irish families in the Valley of Virginia and in the mountains. Gooch was very cooperative, for he did not anticipate the collusions between the Presbyterians and the Established Church since the mountains were a great distance away from the Tidewater and Piedmont regions. As soon as evangelistic preachers began encroaching on the territory of the Established Church, the ruling class demanded that the Commonwealth strictly enforce the law against Nonconformists.⁶⁷

A group in Hanover County read religious books such as Luther's Commentary on Galatians, Whitefield's Sermons

and Boston's Four-fold State. " At first the establishment only ridiculed the emotional revivals, but when attendance of the Established Church fell, the authorities began enforcing nonattendance laws.⁶⁸ Thus, Hanover County became "the cradle of Presbyterianism" in eastern Virginia, and was one of several dissenting movements controlling the fate of the Establishment.⁶⁹

Samuel Davies came to Virginia in 1747 in the period when Presbyterianism was split into the "New Side" and the "Old Side." The Anglican priests did not approve of the preachers proclaiming "New Side" tenets, and in a petition to the House of Burgesses in 1751, they asserted that "the Hanover Presbyterians were mere irresponsible 'lay enthusiasts' or 'strolling pretended ministers' " who had been expelled from the Synod of Philadelphia for their errors. In short, "the clergy viewed 'New Side' Presbyterianism as a non-descript and upstart phrase of dissent, not contemplated in the Act of Toleration."⁷⁰ Once the two Presbyterian groups reunited in 1758, the persecution led by the Anglican authorities affected all Presbyterians.

Davies thought that:

To permit the dissenters to 'worship in their own way' would be little short of equivalent to placing them on an equality with the establishment and this could only mean the ultimate invalidation of the establishment.⁷¹

The authorities, on the other hand, maintained a strict interpretation of the Act of Toleration. The clash arose between the two different approaches of religion, "the external and institutional as opposed to the inner and personal!"⁷²

Militant dissents emerged out of a series of revivals among Presbyterians, Baptists and later Methodists. These submerged, disinherited peoples gathered together, and under the leadership of such men as James Madison, Thomas Jefferson and Patrick Henry, these sects mobilized the masses into a politically conscious organization.⁷³

Patrick Henry became famous for his defense of religious liberty. A Reverend James Murray sued three dissenting preachers to collect his payment of salary in 1764. Henry entered the court unnoticed, and after the prosecutor finished reading his brief opening, Henry began by asking the three Judges if he had heard what the lawyer had read correctly.

Did I hear an expression as of crime, that these men, whom your worships are about to try for misdemeanor, are charged with - with - with what? Preaching the gospel of the Son of God!⁷⁴

Needless to say, the effect of Henry's speech was disastrous for the parson's cause. By 1765 the Presbyterians had all the freedom they could expect under the Act of Toleration.⁷⁵

While the church of England enjoyed the support of the colonial government and the Presbyterians were tolerated, the Baptists were heavily persecuted. Unlike the Presbyterians, the Baptists were not well educated and were usually the lowest social classes. The Regular Baptists had established a stronghold at Ketocton in Loudon County (northern Virginia) in 1751. Since they were Calvinistic and non-revival, they did not arouse the wrath of the Establishment.⁷⁶ The Baptists had a division in their denomination similar to the Presbyterians. The Great Awakening spurred the Separatist faction, but the two groups were unable to unite as the "New Side" and "Old Side" had. Utilizing the Presbyterians protest for more freedom, the Regular Baptists secured more liberties for themselves than the Separatists did. Around 1768 the lower classes realized that the Baptists were pleading their cause, and the persecution from 1768 to the Revolution as more political than religious.⁷⁷

The Revolution slowed the progress of the evangelical principles, while it swept the Establishment off the stage.⁷⁸

The Great Awakening had gradually meshed the common people into a democracy which was to change the form of government. The long suffering of the Baptists and Presbyterians under the Anglican Establishment had created a consciousness of powerful political forces. The struggles for religious freedom trained them for the struggle against the Crown. By the end of the war, the Baptists out-

numbered the Presbyterians.⁷⁹ The Separatists seized the opportunity during the Revolutionary chaos to abolish the establishment.

From 1776 to 1785 the process of disestablishing the church in Virginia occurred step by step. In October, 1776 the General Assembly passed an act exempting different dissenters from support and maintenance of the Established Church. According to Jefferson, debates over the Church's compelling powers took place almost daily from 1776-1779. In 1779 the economic nerve of the Church was severed with the passage of an act "to suspend until the next session, levies on the members of that church for the salaries of their own incumbents."⁸¹

Once the establishment of one church became impossible, the Episcopal Church pressed the General Assembly for multi-establishments. In 1784, the General Assembly passed an act for the incorporation of the PEC. John Meeklin, in The Story of American Dissent, (published by Harcourt, Brace in 1934), gave Patrick Henry credit for uniting the midland region with the Tidewater area to carry the bill.⁸² The passage of the bill alarmed the Baptists and hardened Presbyterian resistance. Many of the Presbyterians had favored establishment of all religions, for the decline of religion and morality appalled them. However, two events foreshadowed the fall of the incorporation and any state governmental preferences. The Baptists took action in 1785 against a bill for assessment and

reasserted the Baptist doctrine that religion was separate from the concerns of the state. Madison prepared his famous "Memorial and Remonstrance," (see Appendix C) in support of the Baptist viewpoint. The second event which doomed the incorporation was the passage of Jefferson's "Act for the Establishment of Religious Freedom" (see Appendix B).⁸⁴ Jefferson had presented the bill in 1779 but it was not enacted until 1786 when Madison focused his Memorial on it.⁸⁵

Wesley Gewehr believed there were three major reasons for the final failure of the Established Church. First, the proper ecclesiastical authorities lacked effective control over the clergy. Secondly, the morals and general character of the clergy was "sadly deficient"; "the immorality, card playing, drunkenness, profanity, avariciousness, and quarrelsomeness" in which some clergy were involved gave the whole group a bad reputation. Finally, Gewehr blamed their defective preaching for causing communicants to search for other sources of God's word.⁸⁶ The Commonwealth's authorities could not suppress the Baptists because their cause had powerful political figures backing it.⁸⁷

The dissenting groups, especially the Baptists, protested the continued incorporation of the Episcopal Church until the Act of Incorporation was repealed in 1784. In 1799 the General Assembly further repealed certain acts and declared the construction of the Bill of Rights and Constitution concerning religion. (Shepherd's

Statutes of Virginia, December, 1798, Chapter 9, p. 149)

The final blow to the Episcopal Church came in January 1802. The General Assembly passed an act which provided for the sale of the glebe lands. Overseers of the poor in each county were instructed to sell vacant glebe lands and to spend the money on the poor, after first paying any debts due from the parish and keeping their commission. (Shepherd's Statutes of Virginia, December, 1801, Chapter 5, pp. 314-316) The long process of disestablishing the PEC was complete. The Baptists had won their fight against the persecutors of the early 1700's and the PEC was virtually dead in Virginia. Only with the leadership of several Bishops accompanied by some evangelistic changes was the Episcopal Church able to survive the crisis.

The delegates to the Federal Convention assembled in 1787, three years after the repeal of the act of incorporation. As Evarts Greene stated in Religion and The State (published by Great Seal Books in 1959), Virginia had a great influence over the First Amendment. Originally the Bill of Rights did not accompany the United States Constitution, and several of the delegates would not sign the Constitution without the guarantees of freedom. The Virginians felt the Bill of Rights was necessary to protect the individual from the state. The Lockean theory that the government should not encroach on the individual's fundamental rights to life, liberty and property influenced the statemen's beliefs, for freedom of religion - freedom from an

established religion and free exercise of one's beliefs - was a liberty all men should have. Greene cited three reasons why the Virginians supported the First Amendment. First, a serious division between the Episcopal ministers and the laity existed. Thomas Jefferson was anticlerical. Secondly, the Great Awakening generated a new excitement in religious worship which drew many disinterested Anglicans to the camps of Separatists and New-Side Presbyterians. Henry favored the Presbyterians. Finally, there was a considerable group among the political leaders who had been influenced by eighteenth century deism which caused them to sympathize with dissenters. Madison had been under Witherspoon's influence at Princeton.⁸⁸

Madison played a major role in the Congressional Committee which drafted the First Amendment.⁸⁹ As Justice Rutledge said in his dissenting opinion of Everson v. Board of Education, 330 US 1 (1947), Madison sought "to secure the ratification of its great product in Virginia as elsewhere." Rutledge further stated:

Madison was certain in his own mind that under the Constitution "there is not a shadow of right in the general government to intermeddle with religion" and that "this subject is, for the honor of America, perfectly free and unshackled. The Government has no jurisdiction over it . . ." (330 US 38-39)

Madison agreed with Jefferson that any toleration of establishment would be a restraint on religious freedom. (330 US 40).

The Virginian influence upon the First Amendment was obviously strong. Since the Episcopal Church was contending with the Baptist and Presbyterian ridicule and step by step stripping of power, the Virginia clergy did not exercise as much dominance over the PEC Constitutional Convention as the Virginia politicians did over the U.S. Constitutional Convention. The whole situation in the Commonwealth was so depressed that a majority of the delegates attending 1785 Convention in Richmond decided not to send representatives to the first National Convention in New York City, but rather to strengthen the remnant of the Church in the state.⁹⁰ At that time the legislature still had control of the general assessment, and the Episcopal Church had petitioned for the right to incorporate.⁹¹

The Episcopal Church in Virginia had a difficult time overcoming those catastrophic thirty years. Under the protection of the British monarch and the Virginia legislature, the Church enjoyed the position of the Established Church. Once the liberal spirit of the Revolution exploded, the fall of the Church was certain, for the Non-conformers were tired of the prestigious denomination oppressing their freedom to worship as they pleased. The loss of the glebe lands and social responsibilities added to the deficiency of clerics, broke the Church down so far that John Marshall did not believe the Episcopal Church in Virginia would survive.

RESOLUTION OF CHURCH PROPERTY DISPUTES IN VIRGINIA

Since its creation the United States Supreme Court has accepted cases concerning church property ownership and has laid a foundation of legal standards for lower courts and attorneys to follow. In 1871 the Court established the basic framework in which to resolve church property disputes and left the details for later decisions. Today all cases in this category must follow neutral principles of law to avoid intermingling of church and state. These neutral principles include an examination of pertinent legal precedents, state statutes pertaining to the issue at hand, deeds to the disputed property, and relevant church laws as long as their enforcement does not require interpretation of church doctrine. Such neutral principles safeguard the courts, a branch of the State, from "establishing" one faith as the State Church.

When the first church property disputes arose in the United States, there were no American precedents. The judges looked to English law for a solution. Most of the Southern and Middle Atlantic states adopted an implied trust doctrine which simply stated that "property conveyed to trustees for the use of a church creates a trust for the promulgation of the tenets and doctrines of that denomination." (Smith v Pedigo, 145 Ind. 361 and 375, 33 NE 777 and 781-82 (1893)) Inclusion of the doctrine in the common law of most states during the

nineteenth and first half of the twentieth centuries signified its importance. Don Sampen, writing in the University of Illinois Law Forum, gave three reasons for the adoption and use of the implied trust doctrine.⁹² First, state constitutions did not provide an obstacle to the doctrine. Yet in states where a strict majority rule existed, the implied trust often interfered with a high degree of religious freedom. Secondly, early churches managed to retain use and possession of the property through two types of trust. Since under state law many churches could not be incorporated and thus could not hold the title, trustees held the property title for the benefit of the society. Incorporation later solved any problems over passage of title upon the death of a trustee. Property could be impressed with an express trust or acquired through an outright purchase or as a gift. "To define the terms in which property was held, courts looked for trust relationships and to the doctrines and customs of the church at the time the conveyance was made to define the nature of the trust." Finally, the courts had an English precedent to rely on. In the states which adopted the implied trust theory for these various reasons, schisms in the major tenets rarely took place since the dissenters often altered the doctrine and therefore could not claim the property.

The Northeastern states, in contrast to the Southern states, favored the majority rule over the implied trust; "As long as the majority voted for change, the courts upheld it on the basis of religious

freedom." The New England states had their foundation in the Congregationalist heritage while the Southern states had transplanted the establishment of the Church of England. Yet, in the Northeast when a divided congregation held property under a trust, and the congregation was a part of a general church organization, the state courts usually enforced the trust in favor of the group adhering to the general church, even without an express trust in the deeds for the general church. The American courts emphasized the continuity of denominational affiliation rather than the British continuity of religious tenets; furthermore they refused to review hierarchical church judicatories only on matters of doctrine.⁹³ Several consequences resulted from the general use of the implied trust and majority rule doctrines in the nineteenth century. As mentioned above, the courts protected the original church organizations, and there were relatively few schisms within the hierarchical churches. In the PECUSA, for example, the Methodist Episcopal Church split off right after the Revolution, and the Reformed Episcopal Church separated in the 1870's. Those two movements were the only permanent splinters of the Episcopal Church until 1976, for the Civil War divisions lasted only as long as the war did. By 1866 the Southern Dioceses had renewed their affiliation with the PECUSA.^{93a} A second consequence of these doctrines was the examination by the court into church doctrine to determine which faction the trust belonged to. Many times courts

found themselves acting as theologians, a job in which many judges felt inadequate.

As late as 1871 lower courts continued to use the English rule of implied trust. To enforce the implied trust, the state judges determined which faction remained true to the original belief, and they necessarily established a religion. The Supreme Court in Watson v. Jones, 13 Wall. (US) 679 (1871) established new standards. Jones alleged that Watson had voluntarily withdrawn from the Presbyterian Church, not the Walnut Street Presbyterian Church, a corporation in Louisville, Kentucky. Justice Miller presented the Supreme Court's decision for the Presbyterian Church. Before examining the facts of the particular case, the Justice classified all church property questions which come before civil courts into three categories. The organizational classification is as follows:

The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support or spread of some specific form of religious doctrine or belief.

The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete in some supreme judicatory over the whole membership of that general organization. (13 Wall. at 722-723) (Emphasis added.)

The court's role in the first class, expressed trust, is "to see that the property so dedicated is not diverted from the trust which is thus attached to its use." (13 Wall. at 723) As long as persons are qualified and willing to carry on the teachings for which the property was deeded, the court must protect the heirs from diversion of the property for other uses. To determine which party has continued in the true doctrine, the court must examine the holding and teaching of the doctrine and form of worship in determining if the accused persons have "defeated the declared objects of the trust." (13 Wall. at 724) The second class of congregational or independent churches govern themselves through a majority of their members or a local board created to govern the group. If the majority rules, then in a schism the majority dictates what the doctrines are, and the minority must consent or leave. If a board of officers controls, then the members who follow the declaration of the board constitute the congregation. Miller stated that:

"This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church." (13 Wall. at 725)

The final class is the most frequent type. The Court is "bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments." (13 Wall. at 726-727) Wherever ecclesiastical judicatories have decided questions, the Court will accept their decisions as binding on the state courts, for the judges of ecclesiastical law are a more learned tribunal in church law than the judges in the state court system. The Court included Presbyterian, Protestant Episcopal and Methodist Episcopal under the supercongregational classification. The state here does not interfere with religious disputes except in the question of a civil right. "When a civil right depends upon an ecclesiastical matter, it is the civil court, and not the ecclesiastical, which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises, as it finds them." (13 Wall. at 731) Thus the rights of property or of contract of a religious organization are protected under the law. Since Watson and the trustees had

separated from the church organization, denied its authority, and joined themselves to another group, they had no right to the property.

Watson v. Jones refuted the English precedent of implied trust that had been used for a century. Previously the courts awarded the property to the faction which had most consistently followed the faith of the founders; majority rule did not overturn the trust.⁹⁴ The precedent for such decisions was an English case, Attorney General ex rel. Mander v. Pearson, 3 Mer 353, 36 Eng Rep 135 (Ch. 1817). In 1701 at the time of the conveyance, local church members had been Trinitarian, but by 1817 a majority had converted to Unitarianism.⁹⁵ The local Unitarian congregation became "distressed when their minister suddenly switched back to Trinitarianism after he had preached the Unitarian doctrine for three years."⁹⁶ The minister and a trustee sought an injunction against a majority of the trustees who wanted to stop the retention of the converted Unitarian minister.⁹⁷ The minority contended that the language of the deed created a trust to promote Trinitarianism whereas the majority asserted that the founder established the conveyance to promote worship and service of God without regard to a particular sect.⁹⁸ Lord Chancellor Eldon stated in the court's opinion, as found in the Yale Law Review, May, 1965:

When it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the Court [can inquire] into what has been the usage of the congregation in respect to it; and . . . [it is] the duty of the Court to administer the truth in such a manner as best to establish the usage, considering it as a matter of implied trust between the members of the congregation. (3 Mer. at 400-401, 36 Eng Rep at 150)⁹⁹

Property use remained only with those who were true to the founder's faith.¹⁰⁰ "To allow a body of worshippers to change its doctrine and yet retain control of its property would be tantamount to allowing a trust for the benefit of A to be diverted to B."¹⁰¹

Lord Eldon had also decided the first case dealing with an intrachurch property dispute, Craigdallie v. Aikman, 1 Dow. 1, 3 Eng Rep 601 (H.L. 1813) (Scot.), which concerned a chapel bought from the Established Church of Scotland in 1737. He used the implied trust doctrine to award the chapel to one society.¹⁰²

Civil cases involving two divisions of a congregation were relatively new to Great Britain; such controversies arose gradually once the Toleration Acts of 1688 allowed other sects to exist along side of the Established Church. American judges could not blindly follow the rulings of their British counterparts, although the trend in the nineteenth century appeared differently. The First Amendment clauses - freedom to worship and prohibition of an Established State Church - hindered the court's authority to inquire into church doctrine.

The Watson case decreased the role of the courts in deciding ecclesiastical questions; the Miller trichotomy replaced the older British implied trust doctrine.¹⁰³ To every rule there must be an exception, and the Watson categories were not without their peculiarities. A modification of the independent congregational rule occurred in Bouldin v Alexander, 15 Wall. 131 (1872). By the 1870's the courts perceived that consent of individual members to be ruled in a church organization could not be unconditional. In this particular case, the Third Colored Baptist Church in Washington, D. C. dismissed its trustees, and the group brought suit to regain their position. The Supreme Court demanded that the church tribunal exhibit some basic notions of fairness and said that:

"It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. We have only to do with rights of property . . . But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others." (15 Wall. at 139-140)

The court majority also held that trustees did not have to be members of the church, and that excommunication of a trustee did not strip him of his position as trustee. Such trustees could not be removed by a minority of the congregation without a warning, charges, or trial in compliance with church rules. (15 Wall. 140) Hence, the

federal judiciary altered the Watson noninterference into independent churches by creating "the right of civil courts to scrutinize church rules and regulate in situations where the church did not follow its own procedural rules."¹⁰⁴

The second modification to the Watson trichotomy arose out of a case, Gonzalez v. Archbishop, 280 US 1 (1929), brought to the U.S. Supreme Court on certiorari from the Philippines. Gonzalez sued the Roman Catholic Archbishop for failing to explain why he had by-passed Gonzalez for an appointment to a chaplaincy. Gonzalez thought he should receive the appointment since a will provided that a member of his family hold the office. Brandeis, writing the opinion, set up three categories within which the Court may examine hierarchical decisions. "In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." (280 US at 163, Emphasis added) The Court "introduced a 'due process' element into the resolution of church disputes, implying that church tribunals must follow their own rules in 'good faith' or be subject to secular intervention."¹⁰⁵ Ecclesiastical tribunals, like independent congregations, are not

completely free of the Court's ruling arm. As long as the hierarchical churches decide their essential qualifications for officeholders without any evidence of "fraud, collusion or arbitrariness," the Court may not interfere.

Although the Supreme Court continued to use the Watson rules with the Bouldin and Gonzalez modifications, the Justices focused their attention on the incorporation of the first ten Amendments to the U.S. Constitution into the Fourteenth so that the prohibition applied to the states. In the famous Cantwell v. Connecticut, 310 US 296 (1940), the Court ruled that "the freedom of conscience and freedom to adhere to such religious organizations or form of worship as the individual may choose, guaranteed by the Fourteenth Amendment, is absolute and cannot be restricted by law; but the free exercise of the chosen form of religion, involving acts, is subject to regulation for the protection of society." Headnote 3, (84 L Ed at 1213) Two years later the Court reaffirmed the "incorporation" rule in Chaplinsky v. New Hampshire, 315 US 568 (1942). The majority stated, "Freedom of worship is among the fundamental rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." (86 L Ed at 1032) Following the Cantwell doctrine, "freedom of worship is similarly sheltered." (86 L Ed at 1035)

A year after Chaplinsky the U.S. Supreme Court expanded the "free exercise" clause from freedom of one group to freedom of all groups with no preferred treatment of one over another. Ruling that all issues of faith be withheld from the jury, the Supreme Court found the lower court in error. To support the argument in United States v. Ballard, 322 US 78 (1943), Justice Douglas relied on Watson and Cantwell. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." Watson v. Jones (13 Wall. at 679) Douglas pointed out the dual aspect of the First Amendment - freedom to believe and freedom to act. This aspect "forestalls compulsion by law to the acceptance of any creed or the practice of any form of worship" and also "safeguards the free exercise of the chosen form of religion." Cantwell (322 US at 86) Justice Douglas wrote that man has the right to worship as he wishes. If a jury purports to find truth or falsity in the faith, then it inhibits the protected freedom. "The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position." Murdock v. Pennsylvania (322 US at 87) Summarizing the 1940's in "free exercise" terms, the interpretation of the clause broadened and was more complete than the "establishment clause" in the First Amendment. States could not violate a person's right to worship.

The "establishment clause" provision did not affect the states until seven years after the Cantwell decision which had applied the "free exercise" clause to state governments through the Fourteenth Amendment. The U.S. Supreme Court accepted a New Jersey case concerning reimbursement of transportation costs to parents whose children attended parochial schools. Justice Black, writing the majority opinion in Everson v. Board of Education, 330 US 1 (1947), traced the history of religious liberty from Jefferson and Madison to the present day. He noted that where churches were established, persecutions and taxes plagued the populace. This fact prompted the Founding Fathers to draft the First Amendment to the U.S. Constitution. Black acknowledged that the Court had incorporated only the "free exercise" clause and proceeds to incorporate the "establishment clause" portion of the First Amendment to apply to the states through the Fourteenth. "There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause." (330 US at 20) The interrelation between the two clauses, summarized by the Court of Appeals in South Carolina, stands as follows: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority." (330 US at 21) Black included an explanation of "establishment of

religion," which asserted:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-church attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." (330 US at 21-22)

Black built a high "wall" between church and state, but the "wall" has a gate in it through which the path of neutrality runs. For cases of church property disputes, the gate opens and the Court enters, following the neutral principles, to decide the disputes. Such governmental neutrality is an exception to Black's fundamental definition of "establishment of religion."

The Court further detailed the "establishment of religion clause" in Illinois ex rel. McCollum v. Board of Education, 333 US 203 (1948). McCollum brought suit in Champaign County

against the Board of Education in which she alleged that taxpayers' money was appropriated to aid religion. The County had a time-release program set up so that students whose parents approved could have religious instruction at school during the last period of the school day. Students who did not participate went ahead with other academic work. Citing the Everson definition, the Court held that this type of a time-release program constituted an establishment of religion. As in the Ballard decision which held that no religious group could be preferred over another, Justice Black wrote, "The [respondent's counsel] argue that historically the First Amendment was intended to forbid any governmental preference of one religion over another, not an impartial governmental assistance of all religions . . . we are unable to accept . . . th[is] contention." (333 US at 207) Douglas and Black within a matter of five years defined the "establishment of religion" clause until the meaning was almost incontestable.

Four years later the Court encountered another time-release scheme. New York City's system differed from the Illinois program, for religious instruction did not take place in public schools or involve public fund expenditures. The religious organizations bore the full cost. The justices accepted these technical distinctions and approved New York's program in Zorach v. Clauston, 343 US 306 (1952). Douglas, for the six-member majority, stated,

"As interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal." (343 US at 312) He also asserted that the people of the United States were a religious people and that the government had to remain neutral in competition between sects. (343 US at 313-314) With the "establishment" clause well defined and operative, interference into church disputes is sticky..

In 1952 the Supreme Court decided on appeal another suit concerning a hierarchical church. Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 US 94 (1952), involved a dispute over the right of possession and use of the Cathedral. Kedroff, appointed by the central Russian Church, occupied the building. St. Nicholas Cathedral was a corporation created by a New York statute in 1925. Justice Reed, writing for the Supreme Court majority, criticized the Court of Appeals for awarding the use of the property to the American branch of the Russian Church "on the theory that this church would most faithfully carry out the purposes of the religion's trust." (344 US at 109) Such "a legislative transfer of control over church property from one rival group of the members to another violates the Constitution's guaranty of freedom of religion notwithstanding the legislature's reasonable belief that the enactment of the statute would free the church from atheistic or subversive influences." (Headnote 6,

97 L Ed at 122) Nor may such an explanation as the reliance to "carry out more effectively and faithfully the purpose of this religious trust," Carrier v Carrier (344 US at 117-118), override the constitutional prohibition to interpose. In addition to the execution argument, New York also sustained the American branch on application of a cy-pres doctrine. Black's Law Dictionary defines cy-pres as "a rule for the construction of instruments in equity, by which the intention of the party is carried out as near as may be, when it would be impossible, or illegal to give it literal effect." The Supreme Court, however, did not approve of the cy-pres application, for the trust avoided the prohibition of the "free exercise" clause. (344 US at 119) No schism had occurred between the Russian and American offshoots. As the Watson rule for hierarchical churches declared, civil courts are bound by "church rule when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues." This rule follows from freedom of religion. (Headnote 12, 97 L Ed at 122) The Court did not apply an implied trust theory although the same conclusion would have resulted. The Court realized that if lower courts or legislatures began to construe ecclesiastical law when resolving disputes, the judicial branch of government would be swamped with church cases between main denominations and their splinters. Consequently, civil courts have no choice but to abide by the judgments of its ecclesiastical

counterparts,¹⁰⁶ but, the Watson rule had not been uniformly applied.

Eight years later the same corporation sued the Russian branch of the Church. The Supreme Court took the case, Kreshik v. St. Nicholas Cathedral, 363 US 190 (1960), and wrote a per curiam opinion. The Court reiterated its previous decision in Kedroff, and compared it to the case at hand. "The decision now under review rests on the same premises which were found to have underlain the enactment of the statute struck down in Kedroff." (363 US at 191) Freedom of religion applies to all types of governmental action and to state judiciaries and legislatures. "The realm of judicial authority is circumscribed narrowly and at all times is in 'strict subordination to ecclesiastical law of a particular church.' (344 US at 122) As for the legislature, they have 'no such obligation . . . and no such power' to resolve disputes of a religious nature." (363 US at 190-191)¹⁰⁷ The Kreshik decision pushed the legislature out of any role in church property disputes and left them for the courts' judgment.

Following the Watson precedent, the Court reaffirmed the abolition of the implied trust doctrine which many courts had continued to employ in church property cases. In 1969 the Court took on certiorari, Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 US 440 (1969). This case involved two local Presbyterian churches in Georgia which had voted to leave the Presbyterian Church in the United States

because of alleged departures from original doctrines. The Hull and Eastern Heights Churches charged that the General Church violated the beliefs of Presbyterianism by its actions in "support of civil disobedience in extreme cases, of ordination of women as ministers, of removal of Bible reading and prayers from public schools,"¹⁰⁸ "of modification in US policy toward the Vietnam War, and of affiliation with the National Council of Churches."¹⁰⁹ The jury returned a verdict for the local churches and sustained the injunction preventing the general church from trespassing. Georgia Common Law still had an implied trust theory, and since the Presbyterian Church had broken the implied trust for the general church when they changed the doctrine and faith, the local churches were entitled to the property. The Georgia court relied on Craigdaille v. Aikman, supra (1813) (Scot.). In an unanimous decision, the U.S. Supreme Court reversed and remanded the case. Brennan, in the majority opinion, gave a complete history of the legal precedents - Watson, Gonzalez, Kedroff and Kreshik. The question before the Court was whether the First Amendment restrained a civil court from rewarding property on the basis of interpretation of church doctrine. Although the Administrative Commission, a lower judicial arm of the Presbyterian Church had investigated the grievances, the local congregations did not exhaust the Church's ecclesiastical judicatory. Instead, they appealed to the civil court. Acknowledging that a civil court was a

"proper forum" for resolution of church property disputes, the Court reasserted the Watson ruling, which stated that for civil courts to determine ecclesiastical questions was inconsistent with the American tradition of separation of church and state. In citing Gonzalez, Brennan pointed out that unless "fraud, collusion or arbitrariness" existed, the Court had no right to interfere into purely ecclesiastical matters.

"The First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." Moreover, "the First Amendment enjoins the employment of governmental organs for essentially religious purposes (Abington School District v. Schempp, supra (1963))." (393 US at 449)

It is the departure-from-doctrine element of the implied trust which required that the court examine the church's doctrine. In reaching a decision the Court necessarily interpreted the beliefs. Very plainly the First Amendment forbids such action; therefore, "the departure-from-doctrine element of Georgia's implied trust theory can play no role in any future judicial proceedings." (393 US at 450) Justice Harlan concurred with the Court, but in a separate opinion. he stated his belief that courts could enforce a deed or a will which

which expressly conditions the gift. In other words, Harlan would enforce the first rule in the Watson decision concerning expressed trusts. The Presbyterian case ended all questions of the validity of an implied trust doctrine.

Another case considered together with Presbyterian Church v. Hull, was Presbyterian Church in the United States v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 SE 2d 658 (1969), cert. denied 396 US 1041 (1970). Justice Grice, in the Georgia state court's opinion, stated that the implied trust on local church property benefited the general church so long as the general church maintained the tenets of the faith. With the fall of the departure-from-doctrine element, the implied trust theory collapsed. Since there was no other basis for a trust favoring the general church in the deeds, state statutes or general church regulations, the court turned to the deeds. One of the deeds held the property in trust "for the use and benefit of the congregation of the Eastern Heights Presbyterian Church" while two other recorded deeds held the property for the Eastern Heights Presbyterian Church and the trustees of the Eastern Heights Presbyterian Church. Clearly the title rested in the local congregation. Similarly, the grantee in the Hull deeds was either Mary Elizabeth Blue Hull Memorial Presbyterian Church or Hull Memorial Church. Since the deeds certified that the property belongs to the local congregations, the court expelled the Presbyterian Church from

the premises. Barbara Norman, in the Fordham Law Review of March, 1977, claimed that "Presbyterian Church v. Hull eroded Watson by resorting to neutral principles of law." After the Supreme Court declared the departure-from-doctrine element unconstitutional, the lower court awarded the local churches the title "by virtue of the original deeds naming them as grantees." The Presbyterian Church in the United States had never invested any funds in the two churches,¹¹⁰ nor was there a reverter clause in its favor; thus the claim of the general church was not established. Any decision of the court would necessarily award the property to one side or the other, but such awardment was not an establishment of one religion over another. The court recognized minimum standards for disposition of property rights just as it recognized the rules for religious conduct.¹¹¹

The University of Illinois Law Forum identified a large, potential abuse which the Hull decision would support. The highest ruling body of the hierarchical churches has the power to exclude discontented members who object to "excommunication of unpopular members, changes in fundamental purposes, or domination of an organization which has the same effect."¹¹² The judicial branches argue that freedom of association and freedom of religion allows those dissatisfied with the changes or the domination to leave the organization or to remain in hopes of influencing some return to normalcy. The Supreme Court did not close other routes of

adjudication, but the implied trust doctrine based on the departure-from-doctrine element was invalidated as a method of adjudicating church property disputes.¹¹² William Freeman, in the October, 1974 edition of the Wake Forest Law Review, suggests that perhaps the first class of Watson, expressed trust, cannot be recognized because enforcement requires that the court examine doctrine. The Hull case states that: "Individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."¹¹³ Hence, part of the Watson trichotomy is questionable, and Watson no longer is the only approach to determining the rightful owner. Freeman discussed Brennan's attempt in Hull to clarify the various approaches to church property disputes. First, "the three rules of Watson only express conditions that may be affected without consideration of doctrine."¹¹⁴ The trichotomy cannot be used unless the "appropriate church governing body can be determined without a resolution of doctrinal questions and without an extensive inquiry into religious polity." (396 US at 370) Secondly, the state may adopt a "formal title" approach; the Presbyterian case is an example of the neutral principles. "The court decides ownership by studying deeds, reverter clauses and general state corporation laws." Finally, the state may apply its particular statutes concerning church property as long as the state leaves control of the ecclesiastical government and doctrine to the church organization.¹¹⁵ The

legislature may approve "special statutes governing church property arrangements in a manner that precludes state interference in doctrine." (393 US at 370) The Supreme Court is not biased toward a particular approach but does concern itself with whether or not such an approach rests on a consideration of doctrinal matters.

In the Hull case the Court only mentioned the neutral principles without explaining what they consisted of. The Court of Appeals of Maryland fashioned the third approach in Maryland and Virginia Eldership of the Churches of God v. The Church of God at Sharpsburg, Inc., 246 Md. 650, 241 A 2d 691 (1968). The Sharpsburg and Indian Springs Churches of God alleged that the General Eldership "had run liberal articles in publications, had permitted relaxation of the rules against dancing, smoking and card playing at the denomination's colleges, had permitted liberal speakers to appear at the college, and had strengthened requirements for certification of ministers unnecessarily by refusing to recognize degrees from certain Bible schools." Judge Barnes, in the decision of the Maryland Court of Appeals, applied the "formal title" approach. "Under that principle, a civil court will enforce deeds, charters, reverter clauses and general state religious incorporation laws in the same manner as it resolves any property dispute, even against a hierarchical policy of a church whose decrees and rulings purport to bind its members, including

rulings prescribing the use and possession of church property." 116

Both of the deeds contained reverter clauses for the Maryland and Virginia Eldership, these reverter clauses took effect only if the local church ceased as an organization. The Eldership had not invested any funds into the churches. After the local congregations voted to leave, the Council of the General Eldership ordered them to forfeit all property rights and privileges of the local church. The pastor lost his annual ordination certificate and did not have the privilege to preach; moreover the Eldership expelled all members who had withdrawn. The General Religion Law of Maryland covers only ownership, use and disposition of property, and in neither charter was the General Eldership mentioned. Judge Barnes listed the three methods by which hierarchical churches insure control over local property. Reverter clauses in the deeds to the property of local churches were the first possibility. Another way to retain the property was through a provision in a constitution or other authoritative sources. Such a reverter phrase must specify a withdrawal from the general organization and would apply with the consent of the local congregation. Finally, the General Assembly could pass an act providing for return of the property to the general church if the local church voted to separate. (241 A 2d at 699) The Constitution of the Maryland and Virginia Eldership did not provide for local property in the event of a schism. After checking all possible sources for reverter clauses,

the Court of Appeals ruled in favor of the local groups.

Initially, the General Eldership appealed the case to the U.S. Supreme Court, which vacated the decision because of the newly-decided Georgia Presbyterian case and remanded the Maryland case. Approving the neutral principles in a per curiam decision, the U.S. Supreme Court found no inquiry into religious doctrine. The state courts used only "applicable statutes of the State of Maryland, provisions of the Constitution of the Maryland and Virginia Eldership, the corporation charters of the two local Churches of God, and the deeds of property to the trustees of the local churches." (241 A 2d at 692) After considering the case a second time, the Maryland Court of Appeals held that the decision relied on neutral principles of law and that no inquiry into church doctrine occurred. On a second appeal to the U.S. Supreme Court, 396 US 367 (1970), the latter dismissed the adjudication for "want of a substantial federal question."

The Supreme Court had, at least temporarily, abandoned the Watson rule of accepting decisions from the highest ecclesiastical council in a hierarchical church. In the future the technical ownership of church property would determine property disputes regardless of the church's governmental structure.

In 1976 the Supreme Court decided a case involving the American-Canadian Diocese of the Serbian Orthodox Church, a hierarchical church seated in Yugoslavia, and a defrocked bishop,

Milivojevich. The bishop brought suit in an Illinois circuit court to "have himself declared the true Diocesan Bishop" and to prevent the church officials from interfering with his corporation's assets. The Supreme Court of Illinois ruled in favor of the bishop; they held the removal and defrockment of Milivojevich were "arbitrary" because the actions did not adhere to the Church's constitution and penal code as the lower court interpreted it. Furthermore, the Diocesan division into three new dioceses was invalid since the Diocese was not consulted prior to the partitioning. (426 US at 708)

The U.S. Supreme Court accepted Serbian Orthodox Diocese v. Milivojevich, 426 US 696 (1976), on certiorari and reversed the lower court's opinion. According to the majority, this case was essentially a religious dispute, not a church property dispute. In a controversy which relies on religious questions, the courts must accept the decision of the highest church judicatory. Civil courts answer four preliminary issues in church property issues. Is the church a hierarchical polity? Is the congregation a member of the hierarchical church? What is the supreme judicial body of the church? What is the decision of the tribunal in this particular case?¹¹⁷

Gonzalez was the first to indicate the possibility of reviewing ecclesiastical property disputes of hierarchical churches when the decision suggested "fraud, collusion or arbitrariness." Brennan,

in Milivojevich, further explained that these exceptions to Watson were only dictua and consequently the Court could reverse the "arbitrariness" exception.

. . . We have concluded that whether or not there is room for 'marginal civil court review' under the narrow rubrics of 'fraud' or 'collusion' when church tribunals act in bad faith for secular purposes, no 'arbitrariness' exception . . . is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. (426 US at 713)

The First Amendment prohibits consideration of the ecclesiastical judicial ruling in matters of doctrine and control. Kedroff "stated that religious freedom encompasses the 'power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' " (426 US at 721-722) In closing, the Court asserted that the First and Fourteenth Amendments allow hierarchical religious organizations to control their societies and create tribunals for deciding disputes. When ecclesiastical tribunals adjudicate controversies, the "U.S. Constitution requires that civil courts accept their decisions as binding upon them." (426 US at 725) Hierarchical church judiciaries will settle intrachurch dissensions which arise out of social issues; however, "the Serbian rule contains a bias toward the hierarchical body which may raise an 'establishment' problem." According to

William Maycock, the Serbian decision "chills 'conditional' unions with hierarchical churches since the conditions of such unions are enforceable and meaningful only as far as the hierarchical body chooses them to be."¹¹⁸ The main thrust of Serbian is for civil courts to avoid ecclesiastical disputes and interpretation of doctrine in adherence to the First Amendment prescriptions.

Although many legal scholars thought the neutral principles approach to church property disputes was buried, the Supreme Court, in another Presbyterian case from Georgia, approved the use of the neutral principles to resolve the controversy. After a 164 to 94 vote to separate from the Presbyterian Church in the United States and unite with the Presbyterian Church in America, the congregational majority continued to hold its services in the church. The minority brought a class action suit in a state court to regain possession and title to the property. "The Augusta-Macon Presbytery appointed a commission to investigate the dispute." (61 L Ed 2d at 781) In its written report, the commission found the minority constituted the "true" congregation. Like the Hull church, the congregation had paid all costs of construction and maintenance. The deeds conveyed the property to the local congregation; neither the state statutes nor the corporate charter of the church contained a reverter clause for the general church. Moreover, the Book of Church Order did not reveal a trust in favor of the general church. (61 L Ed 2d at 783)

In Jones v. Wolfe, 443 US ___, 61 L Ed 2d 775 (1979), the Supreme Court upheld the lower court's decision in favor of the majority. Having admitted all the precedents hereinabove discussed, the Court warned that the neutral principles were not free of complications. Under the Georgian rules of neutrality, the courts examined church documents. When investigating ecclesiastical constitutions, the court must scrutinize the documents in only secular terms and steer clear of any ecclesiastical doctrine.

In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." (Serbian Orthodox Diocese) (61 L Ed 2d at 785)

The Court slid around the question of the "true" representative of the church by using a majority faction. The "majority faction generally can be identified without resolving any question of religious doctrine or polity." On the other hand, "the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free exercise rights or entangle the civil courts in matters of religious controversy." (61 L Ed 2d at 775-776)

The Court stated that "the Constitution does not dictate that a state

must follow any particular method of resolving church property disputes, and that the 'neutral principles of law' approach is consistent with the Constitution." Some advantages to this particular approach are the secularity and flexibility to accomodate all religious sects.¹¹⁹ The Jones v. Wolfe decision proved that the neutral principles doctrine is still valid as one method of resolving church property disputes.

The U.S. Supreme Court has set up a superb foundation of precedents although their direction of thought has been blurred for several years. Beginning with Watson, the Court developed the trichotomy for expressed trusts, congregational churches and hierarchical churches and overthrew implied trusts since such trusts required that the Court interpret church doctrine to determine which faction is the "true" branch of the general church. The implied trust theory, an English law imported for lack of an American precedent, was essentially contract theory. Members of the congregation associated with the general church and agreed to lend support to it on the basis that the general church would agree on some fundamental doctrine which bound all the denominational churches together. Changes in the faith of the general church breached the contract and let the local congregations leave the general organization and rescind its support of the national church so that congregations could follow the tenets of the original doctrine. The Gonzalez opinion added the possibility of

courts interfering with hierarchical churches if the court suspected "fraud, collusion or arbitrariness," while the Bouldin decision ruled that the majority could vote to change the doctrine of an independent church. In other religion-oriented cases, the Court applied both clauses of the First Amendment to the states through the Fourteenth and, shortly thereafter defined the establishment of religion. Kedroff and Kreshik involved a dispute over the same property, and in both these cases the Supreme Court decided that ecclesiastical control as well as doctrinal questions belonged under the church's jurisdiction, not a civil court or state legislature. These later cases followed the Watson hierarchical rule. The Presbyterian Church cases changed the Court's focus, for instead of the Watson trichotomy, the Court utilized the "formal title" approach which is part of the neutral principles theory. This method seems to fit into the expressed trust category of Watson with the exception of the right to decide doctrine, which Justice Harlan firmly believed existed. Maryland and Virginia Eldership reinforced this approach as did Jones v. Wolfe. However, the Serbian case which involved an Orthodox Church, reaffirmed the hierarchical church rule of Watson-Gonzalez - Kedroff. Certainly the states have broad approaches to resolve church property disputes and can manipulate the one they prefer.

Like Georgia, most states have their own church property laws which the Supreme Court adopts when resolving federal questions

dealing with church property disputes. The states must adhere to the federal decisions as well as the state rulings since the First Amendment applies to the states. Virginia has her own precedents in the field, and they reflect the peculiar statutes of the Commonwealth. Section Fifty-seven of the Code of Virginia (1950) establishes the regulations of religious societies. Since the disestablishment of the Episcopal Church, churches have not been incorporated; a Virginia constitutional provision has prohibited such action. Trustees hold the property in favor of local congregations. Justice Daniel of the Virginia Supreme Court upheld the churches' unincorporated status in Brooke v. Shacklett, 13 Gratt. 301 (1856). The Court reiterated the fears associated with allowing churches to acquire large quantities of land and cast an evil shadow over an earlier decision which had favored broader powers for the churches. Brooke evolved from a dispute over the possession and title of a Methodist Episcopal Church South. The original congregation split over the slavery question, but both groups continued in the same faith. Subsequently, there was no question of the "true" church but rather a question of what constituted a "member of the church". Defining a member, the Court stated: "To constitute a member of any church two points at least are essential, without meaning to say that others are not so, a profession of its faith and a submission to its government." (Den v. Bolton, 7 Halst. R. 215) (13 Gratt. at 321) The Court

decided the disputes by examining which of the two preachers were assigned and appointed properly and which of the two parties adhered to the discipline of the ecclesiastical government. The separation followed the plan of the Methodist Episcopal Church South rules, and under this plan, the majority was the lawful successor of the MECS. Those who repudiated the authority of the MECS and refused to receive the appointed pastor left. In conveying the title to the MECS, the Court ruled that the "conveyance, devises and dedications of the property" belonged to the congregation in the "limited and local sense." Since none of the general churches had the right to incorporate, the trustees held the property for the local congregation. Any deed that attempted to place the title in the general church was null and void. In Virginia the local churches have control of the property, and general church organizations cannot control its use if a majority of the local congregation decides to leave the organization.

In a similar case of 1879, the Supreme Court of Virginia reaffirmed the principles of Brooke and examined a 1867 statute for schisms in churches. In Hoskinson v. Pusey, 32 Gratt, 428 (1879), the Court ruled that the two claimants belonged to two separate and distinct organizations, the Methodist Episcopal Church and the Methodist Episcopal Church, South. As in Brooke, the trustees held the conveyance for the local congregation, not the general church. To decide which membership constituted the church, the Court utilized

Daniel's two-point theory. One group attended church regularly, except when the Civil War interrupted such behavior. Furthermore, they adhered to the faith and accepted the appointed pastors. In contrast, the appellants did not submit to the government, nor did they profess to be members. Giving the appellants the benefit of the doubt, the Court checked the Virginia Code to see if any statutes favored the group. In February, 1867, the General Assembly passed an act for divisions in congregations. A portion of it read as follows:

. . . And Whereas divisions have occurred in some churches or religious societies to which such religious congregations have been attached, and such divisions may hereafter occur, it shall in any such case, be lawful for the communicants and pewholders over twenty-one years of age, by vote of a majority of the whole number, as soon as practical after this act, or whenever such division shall occur, to determine which branch of the church or society such congregation shall thereafter belong: and if approved, shall be so entered in the minutes and shall be conclusive as to the title to and control of any property held in trust for such congregation and shall be respected and enforced accordingly in all the courts of this Commonwealth.
(32 Gratt. at 439-440)

The congregation, however, did not separate by this rule. Judge Burks added some dicta about religious disputes at the end of the opinion. He believed a delay of the decision would give the parties a chance to come to a settlement without necessitating the court's judgment. After a delay and an assurance that both parties could not reach a compromise, he proceeded to decide Hoskinson. (32 Gratt. at 444)

Boxwell v. Affleck, 79 Va. 402 (1884), arose out of a conflict between the factions of the MECS, similar to the disputes in Brooke and Hoskinson. The Court asked the identical questions it had presented before. The deed to the property stated that members of the MECS benefited from the conveyance. A joint commission under the command of the conference purported to give both congregations the use of the building. One congregation consisted of the regular members while the other party did not claim to belong to the MECS. The Court ruled that the general conference had no power over the property, and especially did not have the right to allow another church to use the building. The trustees held the land for the purposes of the local congregation. By 1884 the courts had settled any question of general church control of property.

The 1867 statute permitted the civil court to remove themselves from the question of the "true" congregation when determining property ownership. Yet in 1890 when the lower court applied the statute to another Methodist dispute, the State Supreme Court overruled the Circuit Court of Northcumberland County, Virginia. A Mr. Harding granted property to trustees for the benefit and use of the religious congregation of orthodox Methodist Protestants in Heathsville. Some years later a majority of the congregation left the church and joined the MECS. In Finley v. Brent, 87 Va. 103 (1890) the superior court held that the majority could not take the

property with them and explained:

The circuit court of Northumberland County dismissed the bill of the plaintiff, by virtue of the provisions of the act of the Legislature of 1867, providing that, in the contingency of a division of any religious society, it should be lawful for a majority to determine to which branch such congregation shall hereafter belong, which determination, duly reported to court, should conclude questions as to the property held in trust for such congregation. If this act affected this contract of Harding and wife at all, it impaired its obligation, deprived the cestui que trusts named therein and created by the trust, of their property rights, and conveyed the right to dispose of this property to others than those to whom it was granted, and vested in others the power to divest the right of property existing under its provisions, and dispose of these to other persons, and for a different purpose than that which the deed provided for. This was beyond the legislative power, and was in violation of the Constitution of the United States, sec. 10, Art. I, and of the Constitution of Virginia, Art. V, sec. 14, and is, therefore, void and of no effect. (87 Va. at 108)

Moreover, the majority said that a trust deed is held as a valid, binding contract for the church so long as a congregation exists.

Finley is an example of an expressed trust covered in Rule One of Watson. With this set of facts, the court did not interfere with church doctrine to execute the trust.

The Brooke-Hoskinson-Boxwell rule guided the State Supreme Court in their decision in Moore v. Perkins, 192 SE 806 (1937). In the opinion Judge Hudgins argued that "church" or "religious congregation" was defined in a local sense. He sustained the definition by

looking at the restrictions on ecclesiastical landholdings. If the statute had meant "local" to imply a denomination, then the MEC members would have a limited sum to spread among themselves. The judge interpreted the statute to mean that a local church was a local unincorporated body, much like a charity. Repeating the principle found in Gallego's Executors v. Attorney General, 3 Leigh. (30 Va.) 450, Hudgins stated, "A trust for indefinite beneficiaries, if the named trustee is an individual or an unincorporated body, is invalid unless expressly validated by statute." (192 SE at 807) The Virginia Constitution would not permit incorporation of general churches, and the Court had ruled that deeds of trust to the general church were invalid. The local congregations controlled the property. Section 38 of the Code of Virginia, later Section 57-7, said, "Every conveyance, devise or dedication, shall be valid which since 1 January 1777 has been made and every conveyance shall be valid which hereafter shall be made, of land for the use or benefit of any religious congregation as a place for public worship . . ." (192 SE at 807-808)

In further expanding the state's church property law, the Virginia Supreme Court emphasized a concept from Watson. In Carr v. Union Church of Hopewell, 186 Va. 411 (1947), the Court instituted the role of civil courts in particular religious controversies.

The civil and property rights of religious societies may be the subject of litigation. Since the U.S. Supreme Court applied the First Amendment "establishment clause" to the states in 1947, in the Everson decision, the Virginia courts had to decide civil and property rights disputes without "establishing" one church over another.

After the Virginia Supreme Court construed "church" to mean a local unincorporated body in Moore, the judges had to differentiate between two types of trusts, the one for religious purposes and the others for literary or educational purposes. As an explanation for distinguishing religious trusts, the court in Marguire v. Loyd, 193 Va. 138 (1951), quoted Judge Tucker in the Gallego case. Tucker had said:

. . . . [the General Assembly's] jealousy of the possible interference of religious establishments in matters of government, if they're permitted to accumulate large possessions, as the church had been prone to do elsewhere, is doubtless at the bottom of this feeling. The legislature knows . . . that wealth is power. Hence, the provision in the Bill of Rights; hence, solemn protest of the article on the subject of religious freedom; hence, the repeal of the act incorporating the Episcopal Church and of that other act which invested the trustees appointed by religious societies with the power to their property; hence too, in part, the law for the sale of glebe lands; hence the tenacity with which applications for permission to take property in a corporate character (even the necessary ground for church and graveyards) have been refused. The legislature seems to have been fearful, that the grant of any privilege, however trivial, might serve but as an entering wedge to greater demands. Nor did this apprehension of the dangers of ecclesiastical

establishment spring up for the first time with our representative institutions. The history of ages had attested the proneness of such establishment to various accumulations of property. (193 Va. at 149)

The parties contested Sections 57-7 and 57-12, Code of Virginia, (1950). Judge Hudgins recited 57-7 in Moore, supra. Section 57-12 set the limitations on the quantity of real and personal estate trustees could hold for congregations. The legislative purpose of 57-12 was to place a monetary limit on property ownership, excluding books and furniture. Included with the physical property were economic wealth from which the congregation was sole beneficiary and the one hundred thousand dollar limitation on trust funds. Statute 57-12 thus limits religious trusts, whereas educational trusts which were not as threatening have more freedom.

The superior court reviewed another subsection of Section 57 when deciding Baber v. Caldwell, 207 Va. 694 (1967). Subsection 57-9 of the Code recognized the right of a majority of a divided congregation to use the church property if the church was entirely independent of any other church or general society. This first sentence of the paragraph relates to churches such as the Episcopal and Presbyterian organizations which are subject to control by super-congregational bodies. (207 Va. at 698) In Baber the court found that the majority of the congregation had not changed the doctrine and faith of the society. In accordance with Section 57-9, the court ruled that

the minority could not divert the use of the property to practice new and conflicting doctrines. The majority continued to hold the title to the property.

"The Virginia Supreme Court for the first time sustained exercise of jurisdiction over disputes involving church property" in Norfolk Presbytery v. Grace Covenant, 214 Va. 500 (1974). Grace Covenant in Hampton voted to leave the Norfolk Presbytery and the Presbyterian Church in the United States and become an independent church. In compliance with Section 57-15 of the Code of Virginia, the congregation applied to the Circuit Court with their wish for transferring the property title. The Norfolk Presbytery filed a motion to intervene, for the church was under their jurisdiction. The congregation had not informed the Presbytery of their intention to change the title. Judge Cochran ruled that the lower court erred in denying the Presbytery's motion to intervene. The Court following the Brown v. Virginia Advent Christian Conference, 194 Va. 909, precedent, said that if the Presbytery could not establish a proprietary interest in the property, then the Presbytery had no standing to object to the property transfer. Although all the precedents required only the congregations' wishes, the new subsection contemplates that officials of the general church may be the appropriate parties to present such a transfer. The court must look at the organizational structure of the church to determine the proper party.

Section 57-9, as interpreted in Baber, separates all churches into two groups: independent and supercongregational. In the case of a supercongregational church, Section 57-15 requires the transfer to be a request from the general church authorities. (214 Va. at 503) The Virginia Supreme Court complied with the Hull neutral principles of law as defined in Maryland and Virginia Eldership and held that church property conflicts can be resolved using pertinent Virginia statutes, the express language of deeds and relevant provisions of the general church constitutions.

Unlike Georgia, Virginia did not have an implied trust theory, nor could churches incorporate. (214 Va. at 504-505) The legislature expanded the scope of religious trusts to include property benefiting the diocese for residential purposes. Even though the civil courts cannot uphold any implied trusts for supercongregational churches, the judicatories can prevent an hierarchical church from deprivation of property rights held by local trustees. The Presbytery which had the burden of proof had to convince the court that the local congregation violated "either the express language of the deeds or a contractual obligation to the general church." (214 Va. at 507) Norfolk Presbytery set up neutral principles for Virginia church property disputes.

As far as I have found, there have only been two cases between the Diocese of Southwestern Virginia and Anglican dissenters since

the beginning of the recent schism, Diocese of Southwestern Virginia v. Buhrman and Diocese of Southwestern Virginia v. Wyckoff. In the first instance, the Diocese filed suit in Circuit Court in Craig County to regain possession of St. Andrew's Church. The lower court decided Diocese of Southwestern Virginia v. Buhrman, (citation not available) (1978) in favor of the local Episcopal Church; the superior court denied an appeal. Circuit Court Judge Stephenson ruled that the trustees held that property as an unit of the Episcopal Church. Unlike the Amherst Church, St. Andrew's had just recently become a parish with significant financial aid from the Diocese. Such financial aid established a "proprietary interest" in the property, and the local congregation did not have the right to transfer the title.

Diocese of Southwestern Virginia v. Wyckoff, (citation not available) (1979), in contrast to Buhrman, involved Anglican sympathizers and Episcopal supporters whose groups contained about an equal number of people. In May, 1978, a majority of the congregation present at a parish meeting voted to leave the Diocese. This vote followed the procedures of Canon 14 which concerned the election of vestry members, not the transfer of property. Section 57-9 of the Code of Virginia provided a method for determining the title when a schism had occurred. Communicants, pewholders and pewowners of the congregation over the age of eighteen years voted, and the majority of the whole number was the controlling branch. At the meeting fifty-

nine voted to leave the church organization and forty-four to remain. At the time of the meeting the Journal of the Diocese stated there were about one hundred fifty communicants. Judge Koontz handed down the opinion on November 16, 1979 in favor of the hierarchical church. Adhering to the Norfolk Presbytery precedent, the court applied Virginia's neutral principles of law. As mentioned above, Section 57-9 provides for church property in instances of schism within a hierarchical church. A majority of the local congregation must vote for leaving the supercongregational order, and fifty-nine does not constitute a majority of one hundred fifty. Moreover, the congregation did not conform to the statute's limitation on the age of eighteen, for persons under eighteen participated in the vote. Thus, under Virginia statute the congregation adhering to the Episcopal Church was the majority of the congregation entitled to the property. After examining the second element of the neutral principles, the deeds of the contested property, the Court stated that the property had been given for "the use and benefit of the PEC" as long as the trustees and their survivors promoted the interests of the church. The Court did not base its decision on the wording of the deed. Finally, the court found no provision in the national or diocesan canons which permitted a congregation to alienate the real property of the church without the consent of the Bishop acting with the advise and consent of the Standing Committee, a Diocesan body consisting of three clergymen

and three laymen. Relying heavily on Section 57-9 of the Code, the Circuit Court enjoined the Anglicans from further use and occupancy of the property. The case is now on appeal to the Virginia Supreme Court.

The options which a Virginia court has to decide a church property dispute are not as numerous as the federal approaches. The state courts decide a case of an expressed trust for the church which is named in the deed as long as the court does not enter any doctrinal questions. The principle of independent church rule appears in the Code of Virginia, Section 57-9. Since the Commonwealth does not incorporate hierarchical church organizations and recognizes the trustees for the local congregation as the title holders, disputes between parties of an hierarchical church are treated just as controversies between divisions of an independent church. The courts have recognized a role which general churches may play in church property (re Norfolk Presbytery, supra.). Yet the Commonwealth remains skeptical of hierarchical church bodies.

The first division of the neutral principles theory, the federal and state legal precedents, exists in a hardened framework; however, the courts left undetermined many details which will flesh out the skeleton of precedents. Future decisions will resolve the questions of "establishment" when property controversies with different set of facts are decided.

A second aspect of these neutral principles is the state law concerning church property division and regulation. Although many of the Virginia precedents were discussed above, a more concentrated study is necessary. There are two sources of written Virginia law, the Constitution of the Commonwealth and the Code of Virginia.

In the revision of 1970, the Constitutional Commission deleted Article IV, Section 59 of the 1928 Constitution. This provision held that the General Assembly should not incorporate churches or religious denominations, but that the legislature could secure the title to church property to the extent limited by law. The principle still exists in the legal precedents even though the Constitution does not expressly forbid such incorporation.

The revised Constitution still contains the religious freedom clause in Article I, Section 16. This section begins:

That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.¹²⁰

The right of free exercise of choice in religious issues is guaranteed, and likewise, religious tests and taxes for religious purposes are prohibited. "It shall be left free to every person to select his

religious instruction and to make for his support such private contract as he shall please."¹²¹ The descendant of Jefferson's Act of Establishing Religious Freedom combined with the U.S. First Amendment guarantees the liberty Jefferson had dreamed of.

To protect taxpayer's money from legislative misappropriation, the Constitution provides prohibitions in Article IV, Section 16. This section prevents the General Assembly from making appropriations of "public funds, personal property or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society."¹²² Another principle carried over from colonial times is the tax exemption policy for churches. Article X, Section 6 releases all churches from taxes on "buildings with land they occupy, the furniture and furnishings therein and endowment funds . . . used for religious purposes or for the residence of the minister . . . , together with the additional adjacent land reasonably necessary for the convenient use of any such building."¹²³

Section 57 of the Code of Virginia cites the 1785 Act of Religious Freedom in Chapter 1, and details statutes concerning church property in Chapter 2, Subsections 3 through 21. Section 57-3 is the remnant of the 1801 Act for the deposition of glebe lands. In Section 57-9-- How property rights are determined on division of church or society--

only the first sentence is applicable to hierarchical churches such as Episcopal and Presbyterian Churches, according to Baber, supra.

This sentence reads:

If a division has heretofore occurred or shall hereafter occur in a church or religious society to which any such congregation is attached, the communicants, pewholders and pewowners of such congregation over eighteen years of age, may by a vote of a majority of the whole number determine to which branch of the church or society such congregation shall thereafter belong. (Code of Virginia, Volume 8, 1950 Edition, p. 385)

This section is the one the courts turn to when they apply the neutral principles theory to the state statutes.

Section 57-12 restricts the amount of real and personal property the trustees for the religious society may hold. These limitations are extremely stringent because the state still fears the power of the Episcopal and other powerful denominations.

The succeeding section regulates "suits by members against trustees to compel proper application of property." Section 57-13 declares:

Any one or more members of any church diocese or religious congregation may, in his or their names, on behalf of such church diocese or congregation, commence and prosecute a suit in equity against any such trustee to compel him to apply such real or personal estate for the use or benefit of the church diocese or congregation, as his duty shall require. No member of

the church diocese or congregation need be made a defendant to such suit, but, in other respects, the same shall be proceeded in, heard, and determined as other suits in equity, except that it may be proceeded in, notwithstanding the death of the plaintiff as if he were still living. (Code of Virginia, Volume 8, 1950 edition, p. 387)

This section of the statute allowed the Diocese of Southwestern Virginia and wardens of the local parishes to sue the trustees holding the property title. In the two cases discussed in the previous section, the Diocese held that the trustees alienated the church property and asked the local civil court for relief.

The state regulates churches very closely but their jurisdiction lies within the law and does not violate the separation of church and state. Under the state's police power, the legislature has the right to pass acts protecting the churches, just as if they were charities. In Virginia the church is not incorporated and had no charter to define its character; however, these statutes are adequate for resolution of conflicts. Like the legal precedents, this division of the neutral principles theory is well defined, perhaps more completely than the legal framework.

The third facet of the neutral principles doctrine is the deed. Judge Koontz, in his opinion of November 16, 1979, in the Wyckoff case, recapitulated the applicable facts:

"The real property in question was conveyed by deeds dated respectively in 1847 and 1860 and properly recorded in the Clerk's Office of the Circuit Court of Amherst County. By the 1847 deed Elijah Fletcher et ux conveyed to Henry S. Davies, et al, "1 rod and 4 1/2 more or less," in said deed more particularly described, "on which preparations are now being made to erect a new brick church for the use and benefit of the Protestant Episcopal Church," the conveyance being "upon this special trust and this special confidence, however, that they the said (grantees) and the survivor of them and the heirs and assigns of them and the survivor of them shall and will forever have and hold the said piece or parcel of land with all the improvements and appurtenances thereunto belonging for the use and benefit of the Protestant Episcopal Church as they the said (grantees) and the survivor of them and the heirs and assigns of them and the survivor of them shall deem most likely to promote the interest of the said church . . ." By the 1860 deed Sidney Fletcher, Executor of E. Fletcher, dec'd., conveyed unto Henry S. Davies, et al, a parcel of land adjoining the Episcopal Church lot at Amherst Court House, containing about 1/4 of an acre" and described by reference to a prior deed, "To have and to hold the said lot or piece of land to the only use of the parties of the second part for the same use and for the same purposes and upon the same conditions and upon the same trusts as are more particularly set out and contained in a deed from Elijah Fletcher to the said parties of the second part as are set out and contained in this deed to them dated the ____ day of _____, 1847, and recorded in the Clerk's Office of Amherst County Court . . ."

There is little doubt that the PEC is the benefactress and that the property is held in trust for the Church.

Any church canons dealing with property can be applied if the court does not have to interpret church doctrine; this is the fourth

component of the neutral principles doctrine. The PECUSA has two sets of Constitutions and Canons, one on the national level and another on the diocesan level. Title II, Canon 7, Section 1 of the Constitution and Canons of the Episcopal Church (1973) states:

"It shall not be lawful for any Vestry, Trustee or other body authorized by laws of any State or Territory to hold property for any Diocese, Parish or Congregation, to encumber or alienate any dedicated and consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service, belonging to the Parish or Congregation which they represent, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of a Diocese."

The House of Bishops introduced an amendment to the church property canon at the 1979 General Convention. Various bishops whose dioceses had been or were in the legal process of retaining church property argued for the amendment. The Jones v. Wolfe (1979) decision caused the property canon to "state explicitly that an expressed trust in favor of the general church does indeed exist." The amendment which was added to Title I, Canon 6 - new Section 4 - states that:

All real and personal property held by or for the benefit of any parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish,

Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to this Church and its Constitution and Canons.

Section 5 follows:

"The several Dioceses may, at their election, further conform the trust declared under the foregoing Section 4 by appropriate action but no such action shall be necessary for the existence and validity of the trust."

Unlike other actions of the General Convention, which normally take effect on January 1 of the following year, these two amendments took effect immediately upon passage in hopes of discouraging any further lawsuits.¹²⁴

Upon examination of the Diocesan Canons, one finds Canon 21 in the same general vein of National Canon Title II, Canon 7, Section 1. The appointment of trustees is provided for in Canon 17. Canon 10, Section 2a states as one task of the Committee on church property, the recovery and security of any real or personal property the legal title to which is not vested in the trustees.

None of the Canons from the General Convention or Diocesan Council were relevant to the Amherst case, although Judge Koontz said that the trustees had alienated the property. Alienate in this context means "to convey or transfer (as property or a right)

usually by a specific act rather than the due course of law," according to Webster's New Collegiate Dictionary. To my knowledge, the trustees never applied to the Circuit Court of Amherst County for a transfer of property holders. Furthermore, the trustees contended they held the property as they had prior to the May, 1978 meeting and as the trustees before them had. The Anglican congregation worshipping in the building adhered to the faith which the grantor, Elijah Fletcher, had believed, and the respondents claimed they were the Episcopal Church referred to in the two deeds of conveyance. Since the parishioners did not follow the procedure established by the Virginia Code and since the Court is forbidden to consider religious doctrine, the lower court awarded the title to the Episcopal branch.

Had a majority of the known communicants voted to leave the Episcopal Church, the Court might have awarded the property to the Anglican dissenters. An excellent opportunity to test the law arose in August, 1978, when Hal Scott, then the rector of St. Thomas' in Christiansburg, joined the Anglican Diocese and took about one hundred parishioners there with him. The vote was 55% to 45% to leave however, the congregation did not attempt to control the property.¹²⁵ In the Amherst case, the Court could have found an expressed trust for the PEC in the deed and given the land to the Episcopal congregation

to enforce the wishes of Fletcher. Many judges recognize the fact that the faith of religious societies is usually not stagnant and that some change takes place normally; consequently the courts usually consider the denomination the same unless by some bizarre investigation of an ecclesiastical commission rules otherwise. The PECUSA has no judicial court to try these dissenters or to question the modernists who began the trend. Both groups must rely on the civil courts to determine the church property disputes by applying neutral principles of law.

CONCLUSION

The recent modernization of the Protestant Episcopal Church has been as dramatic and influential as the declaration of Henry VIII as head of the Church of England was. While Henry probably took such action to obtain his divorce from Catherine of Aragon so that he would have a lawful heir, the declaration also gave the King more power and subdued the rivalry with the Pope. When Mary came to the throne, she attempted to reverse the action her father had taken, but even with brute force, she could not re-establish the Pope as the head of the British Church. The spark which Henry had begun smoldered under Elizabeth; however, with the later ascension of Charles I, the fire grew into the hot flames of the Reformation and the Commonwealth.

Similarly, the insertion of courses such as protest, economic justice and social change into the curriculum of the seminaries gave off a spark. Some of the Episcopal priests became obsessed with the zeitgeist of the time, and abandoned their traditional roles instead of incorporating the duties of priest with those of a social reformer. Like Mary, some of the Bishops have tried to temper the liberal trend, but they, too, found that action which has passed cannot easily be reversed. The 1960's were the equivalent of the Elizabethan era, for the modern influences smoldered in commissions and conversations.

The "Reformation" began in 1974 and ended in 1979. The church had modified itself and kept up with recent social changes, and the community became a primary concern of the clergy. To increase participation and understanding of the service, the last General Convention adopted the new Prayer Book after a decade of examining several trial-use liturgies. Following the Equal Rights campaign, four Bishops consecrated eleven women. For a deeper awareness of those around us, some priests wish to recognize all types of lifestyles. This shuffle of the status quo has produced conservative and liberal reactions. Hoping to appease lay discontent, the General Convention of 1979 voted to allow parishes to continue the use of the 1928 Book of Common Prayer as long as they had permission from their Bishop and priest. Such action can be compared to that of the Toleration Act of 1689.

The Anglicans represent one group of the conservatives. Separating themselves from the Episcopal hierarchy, they tried to carry on without all the luxuries of the Episcopal Church. As the Roman Catholics in Britain discovered during Mary's reign, the zeitgeist of the times and prior decisions cannot be completely turned around. Certainly change and modernization are part of a religion, but the Anglicans argue that radical movements which leave the basic foundations of the faith are more than mere alteration - indeed such change leads to a "Reformation" and schism. On the

other hand, ultra-liberals complain that the Episcopal Church stopped before finishing the modernization which was needed to increase the role of the Church in society. This faction wants the 1979 Book of Common Prayer adopted as the sole liturgy of the Church and hopes to see homosexuals ordained as priests. Some of these people have become impatient and left the Episcopal Church to join more radical faiths. Meanwhile, the core Episcopal Church is left in between these two groups and is apprehensive to shift toward either faction for fear of leaving more sheep on the wayside.

In considering the survival and continuance of the Anglican Catholic Church, an observer turns back the pages of history to the era when the Episcopal Church was at its weakest point. That particular time in the United States was the period following the Revolutionary War. Although the Anglicans have Bishops which follow in the Apostolic succession, the Episcopal Church questions the validity of these consecrations and will not recognize the dissident group as a valid part of the Anglican Communion. To resolve any controversy which might arise, three candidates should arrange for the Archbishop of Canterbury to consecrate them just as Samuel Provoost, James Madison, and William White did in 1786.¹²⁶

Those discontent with the Episcopal Church are fearful of the Bishops, just as the Presbyterians, Baptists and Quakers were apprehensive about an American Bishop in the eighteenth century. Some of

the Anglicans believe that the majority of the clergy led the laity astray, and that the people must maintain the "true" faith with or without the Episcopal clergy. The ACC has the same basis of being a church of people, not of clergy, like the Colonial Church.

Since this conservative movement is considered a lay movement, the shortage of priests can be understood. Within several years the ranks will probably be filled as they were soon after the three aforesaid Bishops began ordaining ministers. The roots of the Anglicans seemed to be as firmly implanted as the Episcopal roots in eastern Virginia have been, and with a boosting missionary movement, the dissenters may become as strong a "competitor" with the PECUSA as the Methodist Church, another splinter, is.

One of the most traumatic events of this schism has been the heated property disputes. Friends literally become hated enemies overnight, and neighbors will not speak for months. Since the PECUSA does not have an ecclesiastical court system, due to the history of colonial establishment, the two factions necessarily must turn to the civil courts for resolution of the dispute.

The courts in the United States are limited in their examination of ecclesiastical disputes because of prohibitions placed on the judicial branch, as well as other branches of government, by the First Amendment to the Federal Constitution. The U.S. Supreme Court has set certain standards for the courts to follow. The Watson -

Gonzalez - Kedroff - Serbian rule relies on the trichotomy Justice Miller created in Watson. Following these precedents, a court must accept the decision of a ecclesiastical tribunal. Under the definition of "establishment of religion," the court cannot enter a church property dispute which necessarily requires that court to establish one denomination over another before determining the benefactor of trust. Everson applied the First Amendment prohibition to the states through the Fourteenth Amendment.

Once the court determines that it can decide a ecclesiastical property dispute without establishing one religion over another, the U.S. Supreme Court leaves the method of resolution up to the states. In Presbyterian Church v. Hull the Supreme Court held that the implied trust doctrine was unconstitutional because the departure-from-doctrine examination necessitated that the court interpret religious doctrine. The Supreme Court has approved neutral principles of law, which include deeds, state statutes, charters and church law, as approaches to the resolution; they have also upheld the majority rule which Virginia uses. Civil courts may determine church property disputes using a number of methods as long as the determination does not "establish" a religion or necessitate interpretation of religious tenets.

The particular dispute in Amherst is only an example, and I utilized it because of my acquaintances there. The rifts in the original congregation are immense. Only time and faith will heal

the wounds in the friendships and strengthen the weaknesses of both branches. The oak, the Episcopal Church, must repair the damage from the lightening which has struck it. While the old oak is recovering from the blow, a new oak is growing alongside the ancient tree. The sapling suffered from the blight of division, but as the roots spread to more parishes, the new oak may tap greater resources and grow to be the size of the old tree.

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THE AFFIRMATION OF ST. LOUIS

Preface

The Fellowship of Concerned Churchmen, aware of its duty to serve the Church in a time of need, offers this Affirmation of St. Louis for the continuation of the life and witness of the traditional Anglican community of faith.

The Affirmation has two parts: First a brief positive statement of who we are and what must be done to save our heritage; and second, forthright Principles for continuing as faithful servants of Christ, grateful for His gifts to us, and ready to follow Him and do His will.

All Anglicans and Episcopalians are sincerely invited to join with those already fighting for the Faith, and to subscribe to this Affirmation as fellow-workers in this just and good cause.

IN THE NAME OF THE FATHER AND OF THE
SON AND OF THE HOLY GHOST. AMEN.

THE CONTINUATION OF ANGLICANISM - We affirm that the Church of our fathers, sustained by the most Holy Trinity, lives yet, and that we, being moved by the Holy Spirit to walk in that way, are determined to continue in the Catholic Faith, Apostolic Order, Orthodox Worship and Evangelical Witness of the traditional Anglican Church, doing all things necessary for the continuance of the same. We are upheld and strengthened in this determination by the knowledge that many provinces and dioceses of the Anglican Communion have continued steadfast in the same Faith, Order, Worship and Witness, and that they continue to confine ordination to the priesthood and the episcopate to males. We rejoice in these facts and we affirm our solidarity with these provinces and dioceses.

THE DISSOLUTION OF ANGLICAN AND EPISCOPAL CHURCH

STRUCTURE - We affirm that the Anglican Church of Canada and the Protestant Episcopal Church in the United States of America, by their unlawful attempts to alter Faith, Order and Morality (especially in their General Synod of 1975 and General Convention of 1976), have departed from Christ's One, Holy, Catholic and Apostolic Church.

THE NEED TO CONTINUE ORDER IN THE CHURCH - We affirm that all former ecclesiastical governments, being fundamentally impaired by the schismatic acts of lawless Councils, are of no effect among us, and that we must now reorder such godly discipline as will strengthen us in the continuation of our common life and witness.

THE INVALIDITY OF SCHISMATIC AUTHORITY - We affirm that the claim of any such schismatic person or body to act against any Church member, clerical or lay, for his witness to the whole Faith is with no authority of Christ's true Church, and any such inhibition, deposition or discipline is without effect and is absolutely null and void.

THE NEED FOR PRINCIPLES AND A CONSTITUTION - We affirm that fundamental principles (doctrinal, moral and constitutional) are necessary for the present, and that a Constitution (redressing the defects and abuses of our former governments) should be adopted, whereby the Church may be soundly continued.

THE CONTINUATION OF COMMUNION WITH CANTERBURY - We affirm our continued relations of communion with the See of Canterbury and all faithful parts of the Anglican Communion.

WHEREFORE, with a firm trust in Divine Providence, and before Almighty God and all the company of heaven, we solemnly affirm, covenant and declare that we, lawful and faithful members of the Anglican and Episcopal Churches, shall now and hereafter continue and be the unified Anglican Church in North America, in true and valid succession thereto.

Fundamental Principles

In order to carry out these declarations, we set forth these fundamental Principles for our continued life and witness.

PREFACE:

In the firm conviction that "we shall be saved through the grace of the Lord Jesus Christ," and that "there is no other name under heaven given among men by which we must be saved," and acknowledging our duty to proclaim Christ's saving Truth to all peoples, nations and tongues, we declare our intention to hold fast the One, Holy, Catholic and Apostolic Faith of God.

We acknowledge that rule of faith laid down by St. Vincent of Lerins: "Let us hold that which has been believed everywhere, always and by all, for that is truly and properly Catholic."

I

Principles of Doctrine

1. THE NATURE OF THE CHURCH

We gather as people called by God to be faithful and obedient to Him. As the Royal Priestly People of God, the Church is called to be, in fact, the manifestation of Christ in and to the world. True religion is revealed to man by God. We cannot decide what is truth, but rather (in obedience) ought to receive, accept, cherish, defend and teach what God has given us. The Church is created by God, and is beyond the ultimate control of man.

The Church is the Body of Christ at work in the world. She is the society of the baptized called out from the world: In it, but not of it. As Christ's faithful Bride, she is different from the world and must not be influenced by it.

2. THE ESSENTIALS OF TRUTH AND ORDER

We repudiate all deviation or departure from the Faith, in whole or in part, and bear witness to these essential principles of evangelical Truth and apostolic Order:

HOLY SCRIPTURES - The Holy Scriptures of the Old and New Testaments as the authentic record of God's revelation of Himself, His saving activity, and moral demands - a revelation valid for all men and all time.

THE CREEDS - The Nicene Creed as the authoritative summary of the chief articles of the Christian Faith, together with the Apostles' Creed, and that known as the Creed of St. Athanasius to be "thoroughly received and believed" in the sense they have had always in the Catholic Church.

TRADITION - The received Tradition of the Church and its teachings as set forth by "the ancient catholic bishops and doctors," and especially as defined by the Seven Ecumenical Councils of the undivided Church, to the exclusion of all errors, ancient and modern.

SACRAMENTS - The Sacraments of Baptism, Confirmation, the Holy Eucharist, Holy Matrimony, Holy Orders, Penance and Unction of the Sick, as objective and effective signs of the continued presence and saving activity of Christ our Lord among His people and as His covenanted means for conveying His grace. In particular, we affirm the necessity of Baptism and the Holy Eucharist (where they may be had) - Baptism as incorporating us into Christ (with its completion in Confirmation as the "seal of the Holy Spirit"), and the Eucharist as the sacrifice which unites us to the all-sufficient Sacrifice of Christ on the Cross and the Sacrament in which He feeds us with His Body and Blood.

HOLY ORDERS - The Holy Orders of bishops, priests and deacons as the perpetuation of Christ's gift of apostolic ministry to His Church, asserting the necessity of a bishop of apostolic

succession (or a priest ordained by such) as the celebrant of the Eucharist - these Orders consisting exclusively of men in accordance with Christ's Will and institution (as evidenced by the Scriptures), and the universal practice of the Catholic Church.

DEACONESSES - The ancient office and ministry of Deaconesses as a lay vocation for women, affirming the need for proper encouragement of that office.

DUTY OF BISHOPS - Bishops as Apostles, Prophets, Evangelists, Shepherds and Teachers, as well as their duty (together with other clergy and the laity) to guard and defend the purity and integrity of the Church's Faith and Moral Teaching.

THE USE OF OTHER FORMULAE - In affirming these principles, we recognize that all Anglican statements of faith and liturgical formulae must be interpreted in accordance with them.

INCOMPETENCE OF CHURCH BODIES TO ALTER TRUTH - We disclaim any right to competence to suppress, alter or amend any of the ancient Ecumenical Creeds and definitions of Faith, to set aside or depart from Holy Scripture, or to alter or deviate from the essential prerequisites of any Sacrament.

UNITY WITH OTHER BELIEVERS - We declare our firm intention to seek and achieve full sacramental communion and visible unity with other Christians who "worship the Trinity in Unity, and Unity in Trinity," and who hold the Catholic and Apostolic Faith in accordance with the foregoing principles.

II

Principles of Morality

The conscience, as the inherent knowledge of right and wrong, cannot stand alone as a sovereign arbiter of morals. Every Christian is obligated to form his conscience by the Divine Moral Law and the

Mind of Christ as revealed in Holy Scriptures, and by the teachings and Tradition of the Church. We hold that when the Christian conscience is thus properly informed and ruled, it must affirm the following moral principles:

INDIVIDUAL RESPONSIBILITY - All people, individually and collectively, are responsible to their Creator for their acts, motives, thoughts and words, since "we must all appear before the judgment seat of Christ . . ."

SANCTITY OF HUMAN LIFE - Every human being, from the time of his conception, is a creature and child of God, made in His image and likeness, an infinitely precious soul; and that the unjustifiable or inexcusable taking of life is always sinful.

MAN'S DUTY TO GOD - All people are bound by the dictates of the Natural Law and by the revealed Will of God, insofar as they can discern them.

FAMILY LIFE - The God-given sacramental bond in marriage between one man and one woman is God's loving provision for procreation and family life, and sexual activity is to be practiced only within the bonds of Holy Matrimony.

MAN AS SINNER - We recognize that man, as inheritor of original sin, is "very far gone from original righteousness," and as a rebel against God's authority is liable to His righteous judgment.

MAN AND GOD'S GRACE - We recognize, too, that God loves His children and particularly has shown it forth in the redemptive work of our Lord Jesus Christ, and that man cannot be saved by any effort of his own, but by the Grace of God, through repentance and acceptance of God's forgiveness.

CHRISTIAN'S DUTY TO BE MORAL - We believe, therefore, it is the duty of the Church and her members to bear witness to Christian Morality, to follow it in their lives, and to reject the false standards of the world.

Constitutional Principles

In the constitutional revision which must be undertaken, we recommend, for the consideration of continuing Anglicans, the following:

RETAIN THE BEST OF BOTH PROVINCES - That the traditional and tested features of the Canadian and American ecclesiastical systems be retained and used in the administration of the continuing Church.

SELECTION OF BISHOPS - That a non-political means for selection of bishops be devised, adopted and used.

TRIPARTITE SYNOD - That the Church be generally governed by a Holy Synod of three branches (episcopal, clerical and lay), under the presidency of the Primate of the Church.

SCRIPTURAL STANDARDS FOR THE MINISTRY - That the apostolic and scriptural standards for the sacred Ministry be used for all orders of Ministers.

CONCURRENCE OF ALL ORDERS FOR DECISIONS - That the Constitution acknowledge the necessity of the concurrence of all branches of the Synod for decisions in all matters, and that extraordinary majorities be required for the favorable consideration of all matters of importance.

RE-ESTABLISHMENT OF DISCIPLINE - That the Church re-establish an effective permanent system of ecclesiastical courts for the defense of the Faith and the maintenance of discipline over all her members.

CONSTITUTIONAL ASSEMBLY TO BE CALLED - That our bishops shall call a Constitutional Assembly of lay and clerical representatives of dioceses and parishes to convene at the earliest appropriate time to draft a Constitution and Canons by

which we may be unified and governed, with special reference to this Affirmation, and with due consideration to ancient Custom and the General Canon Law, and to the former law of our provinces.

INTERIM ACTION - In the meantime, trusting in the everlasting strength of God to carry us through all our trials, we commend all questions for decision to the proper authorities in each case: Episcopal, diocesan, parochial, encouraging all the faithful to support our witness as subscribers to this Affirmation, and inviting all so doing to share our fellowship and the work of the Church.

IV

Principles of Worship

PRAYER BOOK THE STANDARD OF WORSHIP - In the continuing Anglican Church, the Book of Common Prayer is (and remains) one work in two editions: The Canadian Book of 1962 and the American Book of 1928. Each is fully and equally authoritative. No other standard for worship exists.

CERTAIN VARIANCES PERMITTED - For liturgical use, only the Book of Common Prayer and service books conforming to and incorporating it shall be used.

V

Principles of Action

INTERCOMMUNION WITH OTHER APOSTOLIC CHURCHES - The continuing Anglicans remain in full communion with the See of Canterbury and with all other faithful parts of the Anglican Communion, and should actively seek similar relations with all other Apostolic and Catholic Churches, provided that agreement in the essentials of Faith and Order first be reached.

NON-INVOLVEMENT WITH NON-APOSTOLIC GROUPS - We recognize that the World Council of Churches, and many national and other Councils adhering to the World Council, are non-Apostolic, humanist and secular in purpose and practice, and that under such circumstances, we cannot be members of any of them. We also recognize that the Consultation on Church Union (COCU) and all other such schemes, being non-Apostolic and non-Catholic in their present concept and form, are unacceptable to us, and that we cannot be associated with any of them.

NEED FOR SOUND THEOLOGICAL TRAINING - Re-establishment of spiritual, orthodox and scholarly theological education under episcopal supervision is imperative, and should be encouraged and promoted by all in authority; and learned and godly bishops, other clergy and lay people should undertake and carry on that work without delay.

FINANCIAL AFFAIRS - The right of congregations to control of their temporalities should be firmly and constitutionally recognized and protected.

ADMINISTRATIVE MATTERS - Administration should, we believe, be limited to the most simple and necessary acts, so that emphasis may be centered on worship, pastoral care, spiritual and moral soundness, personal good works, and missionary outreach, in response to God's love for us.

THE CHURCH AS WITNESS TO TRUTH - We recognize also that, as keepers of God's will and truth for man, we can and ought to witness to that will and truth against all manifest evils, remembering that we are as servants in the world, but God's servants first.

PENSIONS AND INSURANCE - We recognize our immediate responsibility to provide for the establishment of sound pension and insurance programs for the protection of the stipendiary clergy and other Church workers.

LEGAL DEFENSE - We recognize the immediate need to coordinate legal resources, financial and professional, for the defense of congregations imperiled by their stand for the Faith, and commend this need most earnestly to the diocesan and parochial authorities.

CONTINUATION, NOT INNOVATION - In this gathering witness of Anglicans and Episcopalians, we continue to be what we are. We do nothing new. We form no new body, but continue as Anglicans and Episcopalians.

NOW, THEREFORE, deeply aware of our duty to all who love and believe the Faith of our Fathers, of our duty to God who alone shall judge what we do, we make this Affirmation.

Before God, we claim our Anglican/Episcopal inheritance, and proclaim the same to the whole Church, through Jesus Christ our Lord, to whom, with the Father and the Holy Ghost, be all honor and glory, world without end. Amen.

Text Taken from The Christian Challenge, November 1977, pp. 19-23.

A BILL FOR ESTABLISHING RELIGIOUS FREEDOM

Thomas Jefferson

[1777]

[Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that] Almighty God hath created the mind free, [and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint;] that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, [but to extend it by its influence on reason alone;] that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves [and abhors,] is sinful and tyrannical: that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependance on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this

or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; that it tends also to corrupt the principles of that [very] religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; [that the opinions of men are not the object of civil government, nor under its jurisdiction;] that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

[We the General Assembly of Virginia do enact] that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

And though we well know that this assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights

of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right. [Parts of the bill that were deleted by amendments.]

Text is taken from the 1784 "Report of the Committee of Revisors" as reprinted in Merrill D. Peterson, The Portable Thomas Jefferson, New York: The Viking Press, 1975, pp. 251-253.

A MEMORIAL AND REMONSTRANCE TO
THE HONOURABLE THE GENERAL ASSEMBLY
OF THE COMMONWEALTH OF VIRGINIA

James Madison

[1785]

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration a Bill printed by order of the last session of the General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound, as faithful members of a free State, to remonstrate against it; and to declare the reasons by which we are determined. We remonstrate against the said Bill -

Because, We hold it for a fundamental and undeniable truth, "that Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion, then, of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him; this duty is precedent, both in order of time and in degree of obligation, to the claims of civil society. Before any man can be considered a member of civil society, he must be considered as a subject of the Governor of the Universe: And if a member of civil society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority, much more must every man who becomes a member of any particular civil society do it with a saving of his allegiance to the Universal Sovereign. We maintain, therefore, that in matters of religion, no man's right is

abridged by the institution of civil society; and that religion is wholly exempt from its cognizance. True it is, that no other rule exists by which any question which may divide a society can be ultimately determined but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.

Because, If religion be exempt from the authority of the society at large, still less can it be subject to that of the legislative body. The latter are but the creatures and viceregents of the former. Their jurisdiction is both derivative and limited. It is limited with regard to the co-ordinate departments: more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely that the metes and bounds which separate each department of power be invariably maintained; but more especially, that neither of them be suffered to overleap the great barrier which defends the rights of the people. The rulers who are guilty of such an encroachment exceed the commission from which they derive their authority, and are tyrants. The people who submit to it are governed by laws made neither by themselves nor by any authority derived from them, and are slaves.

Because, It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.

Because, The Bill violates that equality which ought to be the basis of every law, and which is more indispensable in proportion as the validity or expediency of any law is more liable to be impeached.

If "all men are by nature equally free and independent," all men are to be considered as entering into society on equal conditions, as relinquishing no more, and therefore retaining no less, one than another of their rights. Above all, are they to be considered as retaining an "[equal] title to the free exercise of religion according to the dictates of conscience." Whilst we assert for ourselves a freedom to embrace, to profess, and to observe, the religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man. To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarrantable? Can their piety alone be entrusted with the care of public worship? Ought their religions to be endowed, above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet pre-eminences over their fellow citizens, or that they will be seduced by them from the common opposition to the measure.

Because, The Bill implies, either that the Civil Magistrate is a competent judge of religious truth, or that he may employ religion as an engine of civil policy. The first is an arrogant pretension, falsified by the contradictory opinions of rulers in all ages, and throughout the world: The second, an unhallowed perversion of the means of salvation.

Because, The establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: It is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence,

and the ordinary care of Providence: Nay, it is a contradiction in terms: for, a Religion not invented by human policy must have pre-existed and been supported before it was established by human policy. It is moreover to weaken in those who profess this Religion, a pious confidence in its innate excellence, and the patronage of its author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.

Because, Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less, in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Inquire of the teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect point to the ages prior to its incorporation with civil policy. Propose a restoration of this primitive state, in which its teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

Because, The establishment in question is not necessary for the support of civil government. If it be urged as necessary for the support of civil government only as it is a means of supporting religion, and if it be not necessary for the latter purpose, it cannot be necessary for the former. If religion be not within the cognizance of civil government, how can its legal establishment be said to be necessary to civil government? What influence, in fact, have ecclesiastical establishments had on civil society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the civil authority; in many instances they have civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion, with the same equal

hand which protects his person and his property; by neither invading the equal rights of any sect, nor suffering any sect to invade those of another.

Because, The proposed establishment is a departure from that generous policy which, offering an asylum to the persecuted and oppressed of every nation and religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of citizens all those whose opinions in religion do not bend to those of the legislative authority. Distant as it may be, in its present form, from the Inquisition, it differs from it only in degree. The one is the first step, the other the last, in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign regions, must view the bill as a beacon on our coast, warning him to seek some other haven, where liberty and philanthropy, in their due extent, may offer a more certain repose from his troubles.

Because, It will have a like tendency to banish our citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonored and depopulated flourishing kingdoms.

Because, It will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish religious discord, by proscribing all difference in religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried it has been found to assuage the disease. The American theatre has exhibited proofs that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of religious freedom, we know no name that will too severely reproach our folly.

At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the bill has transformed "that Christian forbearance, love and charity," which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of a law?

Because, The policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be, that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it, with the number still remaining under the dominion of false religions; and how small is the former? Does the policy of the bill tend to lessen the disproportion? No: it at once discourages those who are strangers to the light of revelation from coming into the region of it; and countenances, by example, the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible every obstacle to the victorious progress of truth, the bill, with an ignoble and unchristian timidity, would circumscribe it, with a wall of defence, against the encroachments of error.

Because, Attempts to enforce by legal sanctions acts obnoxious to so great a proportion of citizens, tend to enervate the laws in general, and to slacken the bands of society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? And what may be the effect of so striking an example of impotency in the government, on its general authority?

Because, A measure of such singular magnitude and delicacy ought not to be imposed without the clearest evidence that it is called for by the majority of citizens: And no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next session of Assembly." But the representation must be made equal, before the voice either of the representatives, or of the counties, will be that of the people. Our hope

is, that neither of the former will, after due consideration, espouse the dangerous principle of the bill. Should the event disappoint us, it will still leave us in full confidence that a fair appeal to the latter will reverse the sentence against our liberties.

Because, Finally, "The equal right of every citizen to the free exercise of his religion, according to the dictates of conscience," is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of government," it is enumerated with equal solemnity, or rather studied emphasis. Either, then, we must say, that the will of the Legislature is the only measure of their authority, and that in the plenitude of this authority they may sweep away all our fundamental rights; or that they are bound to leave this particular right untouched and sacred. Either we must say, that they may control the freedom of the press; may abolish the trial by jury; may swallow up the executive and judiciary powers of the State; nay, that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary Assembly; or we must say, that they have no authority to enact into law the Bill under consideration. We, the subscribers, say, that the General Assembly of this Commonwealth have no such authority. And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Law-giver of the Universe, by illuminating those to whom it is addressed, may, on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: And on the other, guide them into every measure which may be worthy of his blessing, may redound to their own praise, and may establish more firmly the liberties, the prosperity, and the happiness of the Commonwealth.

Text taken from John F. Wilson, editor, Church and State in American History Boston: D.C. Heath and Company, 1965, pp. 68-72.

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